BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORWAY DEVELOPMENT,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

VOICESTREAM WIRELESS,
Intervenor-Respondent.

LUBA No. 2001-030

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Gary P. Shepherd.

No appearance by Clackamas County.

William K. Kabeiseman, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Marnie Allen and Preston, Gates and Ellis.

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

AFFIRMED 08/20/2001

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

Petitioner appeals a county decision that grants a conditional use permit to build a telecommunications tower.

MOTION TO INTERVENE

VoiceStream Wireless (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 to construct an 80-foot telecommunications tower with associated facilities on land zoned Future Urbanizable (FU-10). The subject property is located on the top of a hill and is owned by the Mt. Scott Water District. Part of the site is developed with a water reservoir. The site does not have public road frontage, and access to the reservoir is provided by an easement crossing other properties, including petitioner's property, which is adjacent to the subject property. The original application proposed to use the existing easement across petitioner's property for access to the proposed telecommunications tower. At the hearing on the application, petitioner and another property owner testified that the scope of the existing easement does not permit access for the proposed telecommunications tower and that they would not agree to expand its scope.

Intervenor asked that the record be left open in order to address the access issue. Petitioner requested an opportunity to respond to any new evidence submitted by intervenor. The parties agreed to a procedure that was reduced to writing the next day by the hearings officer in his "Order Holding Open the Record" (order). Record 21-22, 44-47. The order specifically provided that any new evidence from intervenor was to be provided by November 21, 2000, a total of seven weeks from the hearing. Petitioner was given an additional seven days, until November 28, 2000, to respond to any new evidence submitted by intervenor. Record 21.

On November 21, 2000, intervenor submitted evidence that it had obtained access to the site from an alternate direction and, as a result, did not require use of the existing easement. On November 28, 2000, petitioner submitted its final argument and requested a continuance for additional time to respond to the new evidence. Petitioner's request was denied in the hearings officer's December 13, 2000 final decision, which approved intervenor's application for a conditional use permit to construct the telecommunications tower. This appeal followed.

JURISDICTION

In its response brief, intervenor challenges petitioner's standing. According to intervenor, petitioner did not file its notice of intent to appeal within 21 days of the date the decision became final, as required by ORS 197.830(9). On the day of oral argument, more than two weeks after intervenor's response brief was filed, petitioner filed a "Memorandum in Response to Intervenor's Motion to Dismiss" (memorandum). Intervenor subsequently moved to strike petitioner's memorandum as untimely. Petitioner then moved to strike intervenor's jurisdictional challenge as untimely because it was first raised in intervenor's response brief, rather than in a motion to dismiss after the petition for review was filed.

Turning first to petitioner's motion to strike, we will consider intervenor's challenge to petitioner's standing. A challenge to our jurisdiction may be raised at any time prior to issuance of the final opinion and order. OAR 660-010-0065(2); *Petersen v. Columbia County*, 33 Or LUBA 253, 256 (1997). Petitioner's motion to strike is denied.

Petitioner's response to intervenor's jurisdictional challenge is, in essence, a reply brief. The proper procedure in this case would have been to file a motion to file a reply brief along with the proposed reply brief as soon as possible after intervenor's response brief was filed. OAR 661-010-0039. Although petitioner did not file its memorandum as soon as possible, such a failure is a technical violation of our rules, and we will not refuse to consider petitioner's memorandum unless intervenor's substantial rights would be prejudiced. OAR

661-010-0005. Intervenor was given seven days to respond in writing to any issues raised in petitioner's memorandum. Therefore, intervenor's substantial rights have not been prejudiced, and we will consider petitioner's memorandum. Intervenor's motion to strike is denied.

Intervenor asserts that we do not have jurisdiction over the hearings officer's decision because petitioner failed to file a timely notice of intent to appeal. ORS 197.830(9) provides that a notice of intent to appeal a land use decision must be filed "not later than 21 days after the date the decision sought to be reviewed becomes final." OAR 661-010-0010(3) provides:

> "Unless a local rule or ordinance specifies that the decision becomes final at a later time than defined in this section, a decision becomes final
>
> "(a) When it is reduced to writing, bears the necessary signatures of the decision maker(s); and
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> "(b) If a written notice of the decision is required by law, when written notice of the decision is mailed to persons entitled to notice."[1]

The hearings officer's decision was reduced to writing, signed, and mailed on December 13, 2000. Petitioner appeared before the hearings officer and was entitled to notice of the decision. The notice sent to petitioner, however, was sent to an incorrect address. The notice of the decision was sent to 13614 Clackamas River Drive rather than petitioner's correct address, 13014 Clackamas River Drive. The notice was apparently sent to the incorrect address because the address written down by petitioner's agent at the public hearing, which the county used for a notice list, was difficult to read.[2] Petitioner apparently did not learn of the county's decision until January 12, 2001 when the county sent a copy of

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[1] Under Clackamas Zoning and Development Ordinance (ZDO) 1304.02, the county's decision in this matter was final for purposes of appeal to LUBA on "the date of mailing of the final written order." For purposes of this appeal, we assume that OAR 661-010-0010(3)(b) and ZDO 1304.02 both provide that the challenged decision became final for purposes of petitioner's appeal to LUBA when it was mailed to petitioner.

[2] We agree with intervenor that the address given at the public hearing is unclear and that the county could reasonably have read the address to be 13614 Clackamas River Drive.

the decision to petitioner's attorney by facsimile.[3] Petitioner filed its notice of intent to appeal nine days after the decision was sent to petitioner by facsimile.

Intervenor argues that the mere act of mailing the decision in an envelope addressed to petitioner makes the decision final and begins the 21-day period for appealing a decision to LUBA. We do not agree. Mailing the decision to an incorrect address is not sufficient to make the decision final under OAR 661-010-0010(3)(b). The mailing of notice pursuant to OAR 661-010-0010(3)(b) necessarily requires that notice be sent to the address provided by the person entitled to notice.[4]

Intervenor also argues that the decision was sent to the incorrect address due to petitioner's agent's illegible handwriting. According to intervenor, the county cannot be expected to provide notice to the correct address when a party does not provide a legible address. If the extent of the county's knowledge regarding petitioner's address consisted of the entry given at the hearing, we would be inclined to agree with intervenor. That entry, however, was not the extent of the county's knowledge. The hearings officer sent an email dated October 4, 2000 to an administrative assistant listing the parties entitled to receive a copy of the order, including petitioner. The email indicated the incorrect address for petitioner, but someone at the county, presumably the administrative assistant, entered a handwritten address correction to reflect petitioner's correct address and provided notice of the order to the proper address. Record 20. Although, as intervenor argued at oral argument,

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[3] We say "apparently" because petitioner suggests but never clearly states that it did not receive its copy of the final decision that was mailed to the incorrect address. For purposes of this decision we assume petitioner did not receive the copy of the decision that was mailed on December 13, 2000. Intervenor objects to our consideration of the January 12, 2001 facsimile because it is not included in the record. We will consider evidence outside of the record for the limited purpose of determining jurisdiction without requiring a motion to take evidence not in the record. *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000).

[4] We leave open the question of whether mailing a notice or decision to an incorrect address would make the decision final for a petitioner who nevertheless receives the notice or decision. We also note that on the date this decision is being issued, LUBA is considering an amendment of OAR 661-010-0010(3) that would repeal OAR 661-010-0010(3)(b).

it is possible the handwritten correction was made after the mailing of notice of the decision to the incorrect address, we believe it is reasonably clear that the correction was made before notice of the final decision was sent out as the corrections also provide the address for another party that was entitled to and received notice.[5]

Sending a copy of the decision to the incorrect address was not sufficient to provide notice of the decision to petitioner. Petitioner received notice of the decision on January 12, 2001.[6] The decision became final as to petitioner on January 12, 2001, and the notice of intent to appeal was filed within 21 days of the date the decision became final. Therefore, the appeal was timely, and we have jurisdiction to hear this appeal.

FIRST AND SECOND ASSIGNMENTS OF ERROR

As discussed earlier, upon closing the public hearing, the hearings officer left the record open for an additional eight weeks. The first seven weeks were for intervenor to submit additional evidence regarding access. The final week was for petitioner to respond to any new evidence that was submitted by intervenor. The parties agreed to this procedure. Record 21. At the end of the eighth week, petitioner requested that the hearings officer give petitioner additional time to respond. Petitioner argues that the county committed a procedural error that prejudiced its substantial rights by failing to grant a continuance or leave the record open for additional time for petitioner to respond to the new evidence regarding access.

Initially, petitioner argues that ORS 197.763(4) entitles it to a continuance whenever new evidence is submitted. However, as intervenor argues, and petitioner conceded at oral argument, the cases petitioner cites in support of its argument construed a prior version of

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[5] We also note petitioner's attorney notified the county in his November 28, 2000 letter that he was representing petitioner. Although the letter does not specifically request that all future correspondence be sent to petitioner's attorney, the attorney's letter provided a second way for the county to provide the decision or notice of the decision to petitioner.

[6] We assume without deciding that the facsimile constituted service by mail.

ORS 197.763(4). The present version of the statute allows a local government to grant a continuance or leave the record open; it does not require that a continuance be granted.[7]

Petitioner also argues that, due to its request for additional time to respond, the county was required to leave the record open pursuant to ORS 197.763(6)(c), which provides:

> "If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

The procedure followed by the hearings officer and agreed to by the parties does not precisely mirror the statute. ORS 197.763(6)(c) envisions the record being held open for at least seven days to receive evidence and then closing. The statute provides that any party would then be able to request that the record be reopened to allow a response to the new evidence that was submitted while the record was held open. The hearings officer would then be required to reopen the record. In this case, the hearings officer anticipated and addressed the likely consequences of leaving the record open in his order.[8] Rather than go through the likely steps of closing and then reopening the record, the hearings officer provided the same opportunities for submitting and responding to evidence in his order. The result is the same; intervenor had an opportunity to present new evidence regarding access, and petitioner had an opportunity to respond to that new evidence. We believe the agreed-upon procedure in the hearings officer's October 4, 2000 order was sufficient to provide the

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[7] ORS 197.763(4)(b) provides, in pertinent part:

> "* * * If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. * * *"

[8] Petitioner requested at the hearing that it be given an opportunity to respond to any new evidence submitted by intervenor. Record 45.

rights guaranteed by ORS 197.763(6)(c). Even if this deviation from the procedure specified in the statute was error, it was procedural error, and petitioner's substantial rights were not prejudiced.

Finally, petitioner argues that seven days was not enough time to respond to the new evidence because the Thanksgiving holiday and a weekend fell within the seven-day period. Petitioner cites an admittedly inapplicable Clackamas County local ordinance that allows for a continuance if new evidence is submitted less than 20 days before a public hearing for the proposition that seven days is not an adequate time to respond to new evidence. The amount of time needed to prepare for a public hearing, however, is different than that needed for providing and responding to additional evidence after the public hearing has already been conducted. As ORS 197.763(6)(b) and (c) illustrate, the legislature views seven days as an acceptable amount of time for responding to such evidence. In any event, petitioner agreed to the schedule and cannot now complain about the county's decision to adhere to that schedule. As intervenor notes, every seven-day period will contain a weekend. The fact that the weekend in this case followed a holiday was foreseeable and does not provide a basis for reversal or remand. If petitioner had been concerned about any time constraints caused by the holiday weekend, then it should not have agreed to the schedule in the first place.[9]

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's decision that certain applicable development standards regarding the new access road are met is not supported by substantial evidence. According to petitioner, while there may be evidence in the record to support

[9] Petitioner explains that the reason it did not object to the schedule was because it believed it controlled the fate of intervenor's application by withholding access. While petitioner's honesty is refreshing, being surprised by intervenor's ultimate success in obtaining alternate access does not entitle petitioner to more than seven days to respond. The hearings officer stated at the October 3, 2000 hearing, without objection, that petitioner would have seven days to respond to intervenor's additional evidence regarding access.

approving the application with the original access road, there is not substantial evidence to support the approval with a new access road. Intervenor responds that this issue was not raised below, and that pursuant to ORS 197.835(3) petitioner is precluded from raising the issue for the first time on appeal.

Because the alternate access was not proposed until the final day for intervenor to submit additional evidence, petitioner could not have raised this issue until the final seven-day period that was provided in the hearings officer's October 4, 2000 order. The only evidence or argument submitted by petitioner during this period consists of a letter to the hearings officer. Record 9-11. Although the letter discusses the new access road's location, it does not argue that constructing the new access road would be complicated by terrain or any other factor. The letter argues that it might be possible to relocate the tower to a different area of the subject property that would have less impact on petitioner's property. Contrary to expressing any problems that might be associated with the new access road, petitioner argues that the new access road should provide a reason to relocate the tower. The letter elaborates on petitioner's prior contention that the tower would loom over petitioner's property. Nothing is said or implied about problems concerning the new proposed access road or about how that road might implicate any approval criteria. The penultimate paragraph concerns a balancing test argument focusing on the tower and does not mention the access road. The final paragraph does not mention the access road and simply requests that the record remain open or that the tower be relocated. The issues raised in the third assignment of error regarding the new access road, including storm drainage, terrain preparation, and design review, were not raised below, and the county was therefore not given "fair notice" of those issues. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). Accordingly, the issues were waived and may not be raised for the first time on appeal. ORS 197.835(3).

The third assignment of error is denied.

The county's decision is affirmed.