BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF JACKSONVILLE,
Petitioner,

vs.

CITY OF JACKSONVILLE,
Respondent,

and

FIRST PRESBYTERIAN CHURCH
OF JACKSONVILLE,
Intervenor-Respondent.

LUBA No. 2003-020

FINAL OPINION
AND ORDER

Appeal from City of Jacksonville.

William H. Sherlock, Eugene, represented petitioner.

Kurt Knudson, Ashland, represented respondent.

Alan D. B. Harper, Medford, represented intervenor-respondent.

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

DISMISSED 04/16/2003

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 a conditional use permit to site a church.

FACTS

The challenged decision is the second decision the city has made on remand from LUBA in this matter. The city's initial decision denied intervenor's application to site the church on the subject property. Intervenor appealed that decision to LUBA. Later, intervenor and the city stipulated to a voluntary remand of the initial decision. *First Presbyterian Church of Jacksonville v. City of Jacksonville*, __ Or LUBA __ (LUBA No. 2000-041, February 21, 2001).

After conducting additional evidentiary proceedings following the February 21, 2001 remand, the city approved the application, with conditions. Petitioner appealed that decision to LUBA, arguing, among other things, that the city erred in allowing two city councilors to participate the decision to approve the application, because those city councilors were biased in favor of the application. We sustained petitioner's assignments of error regarding the participation of one city councilor, and remanded the decision to the city to reconsider the application without the participation of that city councilor. We did not address other assignments of error that challenged the city's findings and the evidentiary support for those findings, concluding that resolution of those assignments of error was premature. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd* 183 Or App 581, 54 P3d 636 (2002).

In response to our remand, the city council reconsidered the application on December 3, 2002. At that meeting, the city council limited testimony to disclosure of *ex parte* contacts by the city councilors, and to rebuttal of those disclosures by interested parties. Members of petitioner's association appeared at that meeting, and testified in opposition to the process, on behalf of petitioner and individually. That testimony included argument that the remand

from LUBA required a full evidentiary hearing on the application in order to correct the error that resulted from the prior participation of the biased city councilor. The city council declined to expand its proceedings to include a full evidentiary hearing, or to continue its deliberations to allow for new testimony and evidence regarding the application. The city council then deliberated and adopted a tentative decision to approve the application. The council directed intervenor to draft findings to support its tentative decision. On January 7, 2003, the city council adopted and signed a 65-page decision. Notice of the city's decision was mailed on January 12, 2003. This appeal followed.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal, arguing that petitioner failed to file a notice of intent to appeal with LUBA within the 21-day deadline established by ORS 197.830(9).[1] According to intervenor, the challenged decision became final on January 7, 2003, the day that the decision was reduced to writing and signed by the decision makers. The notice of intent to appeal was filed at LUBA on February 3, 2003, 27 days after the decision became final.

Petitioner responds that the challenged decision was rendered without a hearing and, therefore, the deadline for filing a notice of intent to appeal is governed by ORS 197.830(3), not ORS 197.830(9).[2] ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing, * * * 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

[1] ORS 197.830(9) provides, in relevant part that "[a] notice of intent to appeal a land use decision * * * shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final."

[2] Petitioner also requests a telephone hearing on the motion to dismiss and intervenor's motion to take evidence not in the record, discussed more fully below. We do not require oral argument to resolve the motions before us and, therefore, petitioner's request is denied.

"(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Petitioner argues that LUBA concluded in *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611, 619 (1991), that where an unincorporated association in its representational capacity challenges a local decision made without a hearing, the appeal period for filing an appeal at LUBA begins on the latest date one of the members of the unincorporated association received actual notice of the challenged decision. According to petitioner, some members of its unincorporated association did not receive notice of the challenged decision until January 12, 2003, which made February 2, 2003 the deadline for filing an appeal with LUBA.[3] Therefore, petitioner argues, its appeal is timely.

Intervenor moves for an order allowing LUBA to consider evidence not in the record pursuant to ORS 661-010-0045 and allowing depositions of those persons and other members of petitioner's organization who may have obtained notice of the challenged decision between January 7, 2003 and January 12, 2003.[4] Petitioner opposes that motion,

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[3] Attached to petitioner's response to intervenor's motion to dismiss are affidavits from eight persons who claim to be members of Friends of Jacksonville. Those affidavits allege that each person obtained actual notice of the city's decision on or after January 12, 2003. February 3, 2003 is 22 days after January 12, 2003. However, February 2, 2003, fell on a Sunday and, pursuant to OAR 661-010-0075(8), a notice of intent to appeal a decision pursuant to ORS 197.830(3)(a) is timely if it filed on the next working day following a Sunday. In addition, most of the persons allege that they received actual notice of the city's decision on or after January 14, 2003, which is less than 21 days prior to the date the notice of intent to appeal was filed.

[4] OAR 660-010-0045 provides, in relevant part:

"(1) * * * The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *

"(2) Motions to Take Evidence:

"(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

"(b) A motion to take evidence shall be accompanied by:

arguing that intervenor has not established with particularity the facts that it seeks to establish and, to the extent it has, those facts are irrelevant. Petitioner argues that the facts intervenor seeks to establish are irrelevant, because there is no dispute that at least one member of petitioner's association did not receive notice of the city's decision until on or after January 12, 2003. According to petitioner, for the purposes of determining the last day to file an appeal, the fact that some other members did receive actual notice prior to January 12, 2003, is irrelevant.

We first address the arguments pertaining to whether the ORS 197.830(3) exception to the appeal deadline set out at ORS 197.830(9) applies, before turning to the parties' arguments pertaining to the motion to take evidence not in the record. Petitioner's argument that ORS 197.830(3) applies is based on the premise that the proceeding conducted by the city council on December 3, 2002 was not a "hearing," because it did not allow for additional testimony or evidence regarding the application.

We disagree. The city's first and second decisions in this matter were both issued following evidentiary hearings. Those city decisions preceded our first and second remand decisions that ultimately led to the city third decision, which is the subject of this appeal. The city's decision following our second remand was simply a continuation of the local proceedings in this matter that have now resulted in a total of three final city decisions. As such, the city's decision on remand was not a decision rendered "without providing a

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> "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
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> "(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.
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> "(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40)."

hearing," within the meaning of ORS 197.830(3). It does not matter whether the city provided an additional "hearing" following our most recent remand in this matter, within the meaning of ORS 197.830(3). ORS 197.830(9) applies, and ORS 197.830(3) does not apply. Because the notice of intent to appeal was not filed within the deadline established by ORS 197.830(9), this appeal must be dismissed.

Petitioner argues in the alternative that its notice of intent to appeal was timely because it was filed 21 days from the date the notice of decision was mailed, and the notice itself stated that the deadline for filing at LUBA was February 3, 2003. Petitioner contends that in this case the city has adopted a policy that extends the deadline for filing the notice of intent to appeal to correspond with the date the local decision is mailed to parties entitled to notice.

Jacksonville City Code 17.112.030 sets out the requirements for a final decision for the purposes of an appeal. It provides, in relevant part, that "the final decision of the city council shall be accomplished by adopting a written resolution * * *. The decision of the council shall be final and have immediate effect." Under the ordinance and OAR 661-010-0010(3), the city's decision became final when it was signed on January 7, 2003.[5] We agree with intervenor that in the face of a clear code provision that establishes when a local land use decision becomes final, petitioner cannot rely on the notice of decision to establish the deadline for filing a notice of intent to appeal at LUBA. *Columbia River Television v. Multnomah County*, 299 Or 325, 329 702 P2d 1065 (1985); *City of Grants Pass v. Josephine County*, 25 Or LUBA 722, 728 (1993). The city's erroneous statement in its notice that the

[5] OAR 661-010-0010(3) provides, in relevant part:

> "A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance."

LUBA appeal deadline was February 3, 2003 does not have the legal effect of extending the appeal deadline.

Because we must dismiss this appeal on other grounds, we need not consider intervenor's motion to take evidence not in the record pertaining to actual notice under ORS 197.830(3).

The appeal is dismissed.