BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER ETTRO,
Petitioner,

vs.

CITY OF WARRENTON,
Respondent,

and

LORI LUM and LUM'S AUTO CENTER,
Intervenor-Respondents.

LUBA No. 2006-077

FINAL OPINION
AND ORDER

Appeal from City of Warrenton.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reeve Kearns, PC.

No appearance by City of Warrenton.

William K. Kabeiseman, Portland, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief was Garvey Schubert Barer, PC.

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

DISMISSED 09/22/2006

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 city ordinance that changes the zoning map designations for two tax lots from residential to commercial.

FACTS

The subject property occupies 4.89 acres. The challenged decision that rezones those 4.89 acres is Ordinance 1091-A. Ordinance 1091-A is a post-acknowledgment land use regulation amendment (PAPA) that was processed under ORS 197.610 to 197.625.[1] Under ORS 197.610, the city is required to provide notice of a proposed PAPA to the Director of the Department of Land Conservation and Development (DLCD) "45 days before the first evidentiary hearing on adoption." On December 5, 2005, the city sent DLCD notice of a January 18, 2006 planning commission hearing on the proposed PAPA. Record 354. On December 20, 2005, the city also sent notice of the January 18, 2006 planning commission hearing to "Adjacent Property Owners." Record 224. Under City of Warrenton Development Code (WDC) 4.1.6(C)(2)(a)(1), the city is required to provide notice of quasi-judicial zoning map amendments to the owners of property located within 200 feet of the rezoned property.[2] The planning commission held its public hearing on the proposal on January 18, 2006, and the city commission subsequently held additional public hearings on February 28, 2006 and March 14, 2006. Record 82, 88-89. At its April 4, 2006 meeting, the city commission held its second reading of Ordinance 1091-A, and approved the ordinance. Record 74.

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[1] In its administrative rule for complying with Goal 5 (Natural Resource, Scenic and Historic Areas, and Open Spaces), LCDC uses the term post-acknowledgment plan amendment, and its acronym PAPA, to refer to post acknowledgment amendments of both comprehensive plans and land use regulations. OAR 660-023-0010(5). We use that acronym in this opinion to refer to the post-acknowledgment land use regulation amendment that is at issue in this appeal.

[2] Petitioners were not among the property owners who received this notice of hearing, and petitioners did not appear at or participate in that hearing.

The city processes zoning map amendments under its Type IV Procedure. WDC 4.1.2(D).[3] Under WDC 4.1.6(J), the challenged ordinance became final on the date "specified in the enacting ordinance."[4] Ordinance 1091-A provides "[t]his ordinance shall become a final land use decision upon its second reading, enactment, and its signing by the mayor." Record 29. As previously noted, the city council held its second reading and adopted Ordinance 1091-A on April 4, 2006, and the mayor signed the ordinance on that date. Ordinance 1091-A therefore became final on April 4, 2006.

The city sent notice of its April 4, 2006 decision to "Adjacent Property Owners," on April 12, 2006. Record 71. The city's April 12, 2006 notice specified that the 21-day deadline to appeal Ordinance 1091-A to LUBA began to run on April 12, 2006 and that the deadline to appeal to LUBA would therefore expire on May 3, 2006. On April 17, 2006, the city provided notice and a copy of Ordinance 1091-A to DLCD, as required by ORS 197.615(1).[5]

Petitioner contends that he first learned of Ordinance 1091-A on April 26, 2006. Petitioner filed this appeal five days later, on May 1, 2006. In their June 9, 2006 motion to dismiss, the city and intervenor both argue that LUBA does not have jurisdiction over this appeal, because it was not timely filed. We turn first to that jurisdictional challenge.

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[3] The copy of the WDC in LUBA's library is dated December 2005 and includes amendments through Ordinance 1084-A. Some citations to the WDC by intervenor are apparently to a different version of the WDC.

[4] WDC 4.1.6(J) provides:

> "A Type IV decision, if approved, shall take effect and shall become final as specified in the enacting ordinance * * *."

[5] ORS 197.615(1) requires that the text of a land use regulation amendment and the findings supporting the amendment be mailed to DLCD "not later than five working days after the final decision by the governing body." Since Ordinance 1091-A provided that it became final on April 4, 2006, the city provided notice to DLCD 13 calendar days after the ordinance became final. The city's apparently late notice to DLCD is not an issue in this appeal.

JURISDICTION

As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). LUBA does not have jurisdiction to review Ordinance 1091-A if petitioner does not have standing to bring this appeal. Petitioner's theory for why he has standing to bring this appeal to LUBA has changed several times. We set out and briefly discuss the relevant statutes below, before explaining why petitioner does not have standing to bring this appeal under any of the theories that he has asserted.

A. The Relevant Statutes

The general rule that governs standing to appeal to LUBA is set out at ORS 197.830(2) and (9) and is relatively straightforward. However, there is a different general standing rule that applies to LUBA appeals of PAPAs. In addition, there are a number of variations on or exceptions to both of those general standing rules, and those exceptions are not so straightforward. The relevant sections of ORS 197.830 are set out below:

> "(1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.
>
> "(2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:
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> (a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> (b) Appeared before the local government, special district or state agency orally or in writing.[6]

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[6] ORS 197.620(1) and (2) provide, as relevant:

> "(1) Notwithstanding the requirements of ORS 197.830(2), persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. * * *

"(3) If a local government makes a land use decision without providing a hearing * * * 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 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.

"* * * * *

"(9) A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. * * *"[7]

1. The General Standing Rule

The general standing rule that governs standing to appeal land use decisions (other than PAPAs) to LUBA is set out at ORS 197.830(2) and the first sentence of ORS 197.830(9). An appellant or petitioner must have "[a]ppeared before the local government,"

"(2) Notwithstanding the requirements of ORS 197.830 (2), the Director of the Department of Land Conservation and Development or any other person may file an appeal of the local government's decision under ORS 197.830 to 197.845, if an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation differs from the proposal submitted under ORS 197.610 to such a degree that the notice under ORS 197.610 did not reasonably describe the nature of the local government final action."

[7] ORS 197.610 to 197.625 establish the procedures that a local government must follow when adopting PAPAs. ORS 197.615 requires that a local government give notice of its decision regarding a PAPA to DLCD and to any party who participated in the local PAPA proceeding and requested in writing that the local government give them notice of the decision.

and must file a notice of intent to appeal with LUBA "not later than 21 days after the date the decision sought to be reviewed becomes final."[8]

2. The PAPA General Standing Rule

The general standing rule for appealing a PAPA decision to LUBA is similar to, but slightly different from, the general standing rule for appealing other kinds of land use decisions to LUBA. The exception provided in the first clause of ORS 197.830(2) replaces the ORS 197.830(2)(b) requirement that a petitioner at LUBA must have "appeared" during the local proceedings with the ORS 197.620(1) general requirement that a petitioner must have "participated" in the proceedings that lead to a PAPA. The "participation" standard that must be met to appeal a PAPA is a little higher hurdle to clear than the "appearance" standard that applies to other kinds of land use decisions. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 586-87, *aff'd* 207 Or App 8, ___ P3d ___ (2006).

A second difference in the PAPA general standing rule is set out in the second sentence in ORS 197.830(9). Whereas under the first sentence of ORS 197.830(9) the 21-day appeal period commences on the date the decision is final, under second sentence of ORS 197.830(9), which applies to PAPAs, the notice of intent to appeal a PAPA to LUBA must be "filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615." Frequently, as in the present case, that notice is sent several days after the decision has become final.[9]

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[8] Our characterization of the standing requirements of ORS 197.830(2) and the first sentence of 197.830(9) as the "general standing rule," is our characterization and that characterization is not used in the statutes. We use that characterization and our characterization of the standing requirements under ORS 197.620(1) and the second sentence of ORS 197.830(9) as the "PAPA general standing rule" to simplify our discussion of the different exceptions that apply to these general rules in certain specified circumstances.

[9] Under OAR 661-010-0010(3) "[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."

With the above summary of the general standing rules that govern standing to appeal PAPAs and other kinds of land use decisions, we turn to petitioner's arguments that he has standing to bring this appeal.

B. Petitioner's Argument Under the PAPA General Standing Rule

If the general standing rule that applies to land use decisions *other than PAPAs* applies here, petitioner did not (1) appear during the city's proceedings, or (2) file a notice of intent to appeal within 21 days after Ordinance 1091-A became final on April 4, 2006.[10] If that general standing rule applies, this appeal would have to be dismissed for either of those reasons. However, petitioner does not rely on that general standing rule. Petitioner relies on the PAPA general standing rule and on two exceptions set out in ORS 197.830. We turn first to petitioner's argument under the PAPA general standing rule.

As we have already explained, under the second sentence of ORS 197.830(9), "[a] notice of intent to appeal [a PAPA decision] shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615." As petitioner correctly points out, the city did not provide notice of its post-acknowledgment land use regulation amendment to the parties who participated in the local proceedings until April 12, 2006, and the city did not provide notice of its decision to DLCD until April 17, 2006. Whether the deadline provided in the second sentence of ORS 197.830(9) is measured from the April 12, 2006 notice to the local parties or from the April 17, 2006 notice to DLCD, petitioner's May 1, 2006 notice of intent to appeal was timely filed.

However, petitioner did not participate in the local proceedings that led to adoption of Ordinance 1091-A. As we have already explained, to have standing to appeal a PAPA

[10] In his response to the city's and respondents' June 9, 2006 motion to dismiss, petitioner erroneously suggests that Ordinance 1091-A did not become final until the city provided notice of its decision on April 12, 2006. We reject the suggestion. As we have already explained, under WDC 4.1.6(J) the decision became final on April 4, 2006, as Ordinance 1091-A provided.

decision to LUBA under ORS 197.620(1), petitioner must have participated in the local proceedings that led to Ordinance 1091-A. Petitioner concedes that he did not appear or participate in the local proceedings that led to adoption of Ordinance 1091-A. It follows that petitioner does not have standing to appeal under the PAPA general standing rule.

C. Petitioner's Initial Theory Under ORS 197.830(3)

One of the circumstances in which ORS 197.830(3) either overrides or applies in place of the general standing rule described in section A(1) of this opinion is where a land use decision was rendered without providing a hearing. In that circumstance, ORS 197.830(3) tolls commencement of the 21-day appeal period to the date the petitioner receives actual or constructive notice of the decision. In *Leonard v. Union County*, 24 Or LUBA 362, 374-75 (1992), *overruled in part, Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 431-32, 899 P2d 720 (1995), we held that where a local government provides a hearing but neglects to provide notice to a person who is legally entitled to notice of that hearing, the local government fails to provide a hearing to that person, within the meaning of ORS 197.830(3).

Petitioner initially argued that he was entitled to receive notice of the January 18, 2006 hearing under WDC 4.1.6(C)(2)(a)(1), as one of the "property owners within 200 feet of the site," and the city failed to provide that notice. Citing *Leonard* and the city's failure to provide him with notice of the January 18, 2006 public hearing, petitioner argued that ORS 197.830(3) applies in place of the general standing rule. Petitioner contended that he filed his notice of intent to appeal within 21 days after he received actual or constructive notice of Ordinance 1091-A, making the notice of intent to appeal timely filed.

There are a number of flaws in petitioner's initial ORS 197.830(3) theory. A simple and fatal flaw, as petitioner concedes, is that his property is not located within 200 feet of the rezoned property, and he was not entitled to notice of the January 18, 2006 hearing under

WDC 4.1.6(C)(2)(a)(1). For that reason alone, we reject petitioner's initial ORS 197.830(3) theory.[11]

D. Petitioner's Second Theory Under ORS 197.830(3)

In his petition for review, petitioner appears to abandon some or all of his prior jurisdictional arguments, and argues instead that his appeal was timely filed because the city's decision differed from the proposed action described in the notice of hearing.[12]

> "While petitioner did not appear before the local decision maker, he has standing to appeal the decision under ORS 197.830(3) because, what was finally approved by the city, is significantly different from what was described in the city's notice of the original proposal. In particular, the city's original notice stated that this zone change from a residential to a commercial zone would be evaluated against, and be required to comply with, the City's transportation requirements in WDC chapters 4.7, 4.13 and OAR 660-012-0060 (the Transportation Planning Rule or 'TPR'). The proposal that was finally approved never made any such demonstration, contained no findings of compliance, but instead the City deferred an evaluation of all of these criteria until a subsequent, post-approval, non-public proceeding. As such, the final land use decision 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 what the city ultimately approved, and petitioner is

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[11] There are other flaws in petitioner's initial ORS 197.830(3) theory. We note one of them in passing here. Petitioner advanced his initial ORS 197.830(3) theory to avoid the general standing rule that applies to land use decisions other than PAPAs, under which the 21-day deadline begins to run when the decision is final. However, if one of the general standing rules governs petitioner's standing to bring this appeal, it is the PAPA general standing rule, not the general standing rule that applies to other kinds of land use decisions. Under the PAPA general standing rule, as we have already concluded, petitioner's notice of intent to appeal was timely filed. Petitioner's problem under the PAPA general standing rule is that he did not participate in the local proceedings, and for that reason does not have standing to appeal. Moreover, even if petitioner's problem under the PAPA general standing rule was that the notice of intent to appeal was filed late, and even if petitioner were entitled to notice of the PAPA hearing under local law and the city had failed to provide notice of that hearing, that failure would not toll commencement of the 21-day appeal period. In *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 431-32, 899 P2d 720 (1995), the Court of Appeals specifically held that a local government's failure to provide a notice that is required only by *local law* does not have the effect of tolling the *statutory* deadline established by the second sentence of ORS 197.830(9).

[12] ORS 197.830(3) is set out in full in the text above. As relevant to petitioner's standing argument, ORS 197.830(3) would apply to excuse the appearance requirement of ORS 197.830(2) and extend the deadline for filing the notice of intent to appeal where "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" and the petitioner is "adversely affected or aggrieved" by the decision.

adversely affected and aggrieved by the city's action." Petition for Review 2 (record citations omitted).

Even if the city's notice in this case did not sufficiently describe the proposal, as petitioner alleges, the alleged inadequacy of the notice must be evaluated under ORS 197.620(2), not ORS 197.830(3).[13] As we have already explained, there is no dispute that Ordinance 1091-A is a post-acknowledgment land use regulation amendment that was processed under ORS 197.610 to 197.625. As such, the provisions of ORS 197.620(2) would apply in circumstances where the notice of the proposed action allegedly "does not reasonably describe the nature of the local government final action."

Petitioner's citation of and reliance on ORS 197.830(3) instead of ORS 197.620(2) is not necessarily fatal, if petitioner has nevertheless established that the city's notice "did not reasonably describe what the city ultimately approved." ORS 197.620(2) is in one respect easier to take advantage of than ORS 197.830(3). A person attempting to take advantage of ORS 197.830(3) must be "adversely affected or aggrieved," but ORS 197.620(2) is available to the Director of DLCD and "any other person," without regard to whether they are adversely affected or aggrieved. Just as importantly, the substantive standard that must be applied to find a notice defective under ORS 197.620(2) is nearly identical to the substantive standard that is applied under ORS 197.830(3). *Compare* ns 12 and 13. Although the parties do not address this issue, we see no material difference in the standard that is to be applied to notices under the two statutes. For purposes of this opinion, we will consider the parties' arguments regarding the defective notice provisions in ORS 197.830(3) as though they were directed at ORS 197.620(2).

[13] ORS 197.620(2)) is set out in full in n 6 above. As relevant to this jurisdictional argument, ORS 197.620(2) would apply to excuse the participation requirement of ORS 197.620(1) where the PAPA decision "differs from the proposal submitted under ORS 197.610 to such a degree that the notice under ORS 197.610 did not reasonably describe the nature of the local government final action."

Intervenor argues that petitioner's contention that the city's notice of its January 18, 2006 hearing was inadequate to describe its final action is without merit:

> "* * * Petitioner's argument demonstrates a fundamental misunderstanding regarding the purpose of the second clause in ORS 197.830(3). That clause allows a person who is adversely affected or aggrieved to appeal a land use decision when the decision approved is different from the 'proposal described in the notice of the hearing.' The notice of hearing can be found [in the record] and it describes the proposal as follows:
>
> > "'A public hearing is scheduled [to consider] a rezone of tax lots 3000/3001 * * *. This request is to rezone the tax lots from Residential (R-10) to General Commercial (C-1). The proposed re-zone has been submitted by Lori Lum, applicant for the property owner, Lum's Auto Center. The properties are located at the SE corner of Dolphin Ave and Hwy 104 spur in the city limits of Warrenton. The total area for these two tax lots is approximately 4.89 acres.'
>
> "That proposal was exactly what was adopted; it was unchanged either by the applicant, or by any condition of approval or requirement of the Planning Commission or City Commission. * * *
>
> "Petitioner does not even attempt to demonstrate that the decision made by the City is any different than what was proposed by the applicant and noticed in the notice of hearing. His real concern appears to be that the City did not adequately address the criteria identified in the notice of hearing. That [concern] may provide him with an assignment of error, if he has standing, but he cannot use his disagreement with the findings to bootstrap himself into standing. If Petitioner's interpretation of the second clause of ORS 197.830(3) was correct, it would eviscerate the requirement for an appearance in most land use decisions. All a prospective petitioner would need to do is identify a criterion from the notice of hearing that he/she believes was either not addressed or inadequately addressed in a final decision and assert that the failure to address it means that the final decision is different [from] what was proposed in the notice of hearing. Such an interpretation would transmogrify a very limited exception from the appearance requirement into a gigantic loophole." Response to Petition for Review 2-3 (footnote omitted).

We generally agree with intervenor. As intervenor correctly points out, the only appellate court case that has considered the relevant language in ORS 197.830(3) makes it clear that ORS 197.830(3) applies where the nature or scope of the proposed use that is described in the notice that precedes the local government's public hearing is later changed

and approved as changed in the local government's decision. *Bigley v. City of Portland*, 168 Or App 508, 513-15, 4 P3d 741 (2000) (change in zoo master plan to make a temporary parking lot a permanent parking lot). Given the relevant language of ORS 197.830(3) and 197.620(2), it also seems likely that if the scope or nature of the proposed permit or comprehensive plan or land use regulation amendment described in the notice materially changed, ORS 197.830(3) and 197.620(2) would apply even if the use proposed did not.[14]

We need not attempt here to define the scope of changes that might trigger ORS 197.830(3) or 197.620(2) precisely. Whatever changes the relevant language of ORS 197.830(3) or 197.620(2) might encompass, we agree with intervenor that it does not extend to protect inferences that petitioner draws from the city's notice of hearing about how the city planned to go about reviewing and approving the proposed use under the relevant approval criteria that are identified in the notice. Petitioner's main concern in attacking the adequacy of the city's notice in this case is that the city's findings allegedly are inadequate and that the city may have improperly deferred some aspects of its review to later proceedings, rather than finding that all approval criteria are satisfied in the appealed ordinance. Without commenting on whether the city may have improperly deferred any decision making in this case to later proceedings, provided local governments adopt adequate findings, and provide sufficient opportunities for additional public hearings where necessary, deferral of decision making to later proceedings may be entirely appropriate. *Patterson v. City of Bend*, 201 Or App 344, 349-50, 118 P3d 842 (2005); *Neighbors for Livability v. City of Beaverton*, 178 Or App 185, 194, 35 P3d 1122 (2001); *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). We agree with intervenor that any questions that may be raised regarding how the city has chosen to go about applying the identified approval criteria to the

[14] For example, even if the proposed use did not change, approval of a more intensive zoning district that would allow the proposed use to expand or change in the future in ways that the zoning district identified in the notice would not allow would almost certainly implicate ORS 197.830(3) or 197.620(2).

proposal described in the notice implicates the merits of this appeal; those questions do not implicate the adequacy of the city's notice under ORS 197.620(2) and 197.830(3).

For the reasons explained above, even if ORS 197.620(2) might apply to excuse petitioner's failure to participate in the city's proceedings leading to the adoption of Ordinance 1091-A, we reject petitioner's contention that the city's notice of hearing in this matter "did not reasonably describe the nature of the local government final action."

E. Conclusion

The PAPA general standing rule that governs standing to appeal a PAPA decision applies in this case. Under the PAPA general standing rule, petitioner's May 1, 2006 notice of intent to appeal was timely filed. However, to have standing to appeal Ordinance 1091-A ORS 197.620(1) requires that petitioner have "participated" in the local proceedings that led to the city's adoption of Ordinance 1091-A. Petitioner did not participate in those proceedings. ORS 197.620(2) might excuse petitioner's failure to participate in the city's proceedings in this matter if the proposal that was approved in Ordinance 1091-A differed from the proposal that was submitted to DLCD and described in the city's notices of hearing "to such a degree that the notice * * * did not reasonably describe the nature of the local government final action." We conclude the notice was adequate and reasonably described the proposal that was ultimately approved. It follows that petitioner does not have standing to bring this appeal.

This appeal is dismissed.