BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HERBERT NEELUND, VALERIE NEELUND,
MICHAEL DEMITH, DIANA DEMITH
and JOHN BACA,
Petitioners,

and

HOLGER T. SOMMER,
Intervenor-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

GARY DALRYMPLE and DEBBIE DERENSKI,
Intervenors-Respondent.

LUBA No. 2006-080

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Herbert Neelund, Valerie Neelund, Michael Demith, Diana Demith, and John Baca, represented themselves.

Holger T. Sommer represented himself.

Steven E. Rich, Grants Pass, represented respondent.

Duane Wm. Schultz, Grants Pass, represented intervenors-respondent.

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

DISMISSED 10/10/2006

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

Opinion by Bassham

NATURE OF THE DECISION

Petitioners appeal a development permit that authorizes construction of a dwelling and that modifies a condition of approval in the partition plat that created the parcel.

MOTION TO INTERVENE

Holger T. Sommer moves to intervene on the side of petitioners. There is no opposition to the motion, and it is allowed.

MOTION TO DISMISS

The county moves to dismiss this appeal, arguing that the challenged decision is not subject to LUBA's jurisdiction because (1) the challenged decision is a "ministerial" decision that is excluded from LUBA's jurisdiction, and (2) the appeal was untimely filed.

The subject property is a narrow, undeveloped parcel zoned Rural Residential 1 (RR-1). The Rogue River borders the property to the north. An irrigation canal separates the southern one-third of the parcel from the northern two-thirds. The parcel was created in 1992, pursuant to a hearings officer's partition decision. Condition 16 of that 1992 partition decision states that "[a]ll homesites shall be located south of the irrigation canal." In 2004, intervenors-respondent (intervenors) applied for a building permit to construct a dwelling on the south side of the canal. Intervenors also applied for a variance to the front yard setback. The county provided notice of the variance request to nearby property owners. After local opposition arose, intervenors withdrew the variance request. On January 21, 2005, the county sent a letter to "interested parties" stating that the variance request was withdrawn, and that intervenors would instead build the dwelling north of the irrigation canal, with the garage on the south side, at locations that meet all setbacks in the RR-1 zone. The January 21, 2005 letter was mailed to each of the petitioners, who reside within 250 feet of the subject property. Respondent's Amended Motion to Dismiss, Exhibit 1, page 3. Accompanying the letter was a site plan showing the proposed new location of the dwelling.

Id., Exhibit 1, page 2. The letter is carbon copied to intervenor-petitioner Sommer. However, Sommer and the named petitioners dispute by affidavit that they received a copy of the January 21, 2005 letter.

Intervenors subsequently applied for a development permit for the dwelling at the new location north of the canal. The application proposes a 6,000-square foot dwelling and a 720-square foot attached garage north of the canal at the approximate location identified in the site plan attached to the January 21, 2005 letter, as well as a 864-square foot accessory building south of the canal. The county applied its "ministerial review procedures" at Rural Land Development Code (RLDC) 22.030 to the application. RLDC 22.030 does not require notice or opportunity for comment. The county planning department administratively approved the development permit on June 6, 2005.

On March 14, 2006, intervenors filed a request for a variance to the height restriction governing structures in the RR-1 zone. The county applied the "quasi-judicial review procedures" at RLDC 22.040 to the variance request, which requires notice and an opportunity for comment. The county sent notices to each of the petitioners, but not to intervenor-petitioner Sommer, who does not reside within the notice area. The notice was accompanied by a small-scale map that does not show the location of the dwelling on the subject property. On March 22, 2006, Sommer sent an e-mail to the county requesting information on the application and asking to be included on the mailing list. The county sent Sommer some information the next day. On April 7, 2006, intervenors withdrew the height variance request. At some point (the parties dispute the date), Sommer and the petitioners received a copy of the January 21, 2005 letter describing intervenors' intent to construct the dwelling north of the canal. On May 4, 2006, petitioners filed this appeal, seeking review of the June 6, 2005 development permit.

A. Ministerial Decision

We turn first to the county's argument that the challenged development permit is subject to the "ministerial exceptions" to LUBA's jurisdiction.

As relevant here, LUBA's jurisdiction is confined to land use decisions. ORS 197.015(11)(a) defines "land use decision" in relevant part as a "final decision or determination made by a local government * * * that concerns the adoption, amendment or application" of a "land use regulation." ORS 197.015(11)(b)(A) excludes from the definition of land use decision a decision that "is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." Similarly, ORS 197.015(11)(b)(B) excludes from the definition of "land use decision" a decision of a local government "[t]hat approves or denies a building permit issued under clear and objective land use standards." We understand the county to argue that the challenged development permit decision falls into one or both of these exceptions.

RLDC Article 22 distinguishes between "ministerial" and "quasi-judicial" review procedures. RLDC 22.030 governs "ministerial review procedures," and provides in relevant part:

> "A. This review shall apply to permit requests involving the application of clear and objective standards for approval, and which are therefore considered ministerial. Ministerial review shall not involve the interpretation of criteria or the exercise of policy or legal judgment.
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> "B. Ministerial review shall not require public notice or hearing.
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> "C. The Director shall review all ministerial applications to determine compliance with applicable standards. If the Director determines an application is complete and that it complies with relevant standards, the application shall be approved."

We do not understand petitioners[1] to dispute that, in typical circumstances, a development permit to construct a dwelling within the RR-1 zone is or can be a "ministerial decision" for purposes of RLDC 22.030 and ORS 197.015(11)(b)(A) or (B). Petitioners do not cite to any land use regulations governing development permit standards in the RR-1 zone that petitioners believe to be unclear or subjective, or that require interpretation or the exercise of policy or legal judgment. Instead, petitioners argue that the development permit violates Condition 16 of the 1992 partition approval, and that the planning director has no authority to administratively remove a condition imposed in a quasi-judicial land use decision made by a county hearings officer after a public hearing process. According to petitioners, the only lawful way to modify Condition 16 as it applies to the subject property is by means of a similar quasi-judicial process that provides notice and an opportunity for comment or hearing. Therefore, petitioners argue, the June 6, 2006 development permit approval does not fall into the "ministerial" exceptions to LUBA's jurisdiction at ORS 197.015(11)(b)(A) or (B).

The county responds that RLDC 50.120 expressly allows the planning director to modify the conditions of approval of an approved tentative or final plat, using the ministerial review procedures in RLDC 22.030, where the applicant demonstrates that certain requisite circumstances exist.[2] The county submitted an affidavit from a county planner stating that the challenged development permit was issued pursuant to RLDC 22.030 and 50.120.[3]

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[1] Petitioners and intervenor-petitioner filed a joint response to the motions to dismiss. For convenience, we refer to both sets of parties as "petitioners."

[2] RLDC 50.120 provides:

> "A. During the course of development of an approved tentative plan or final plat the Director is authorized to modify one or more of the conditions of approval when all of the following exist:
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> > "1. A complication exists in the performance of a condition of the approval resulting from an unanticipated circumstance arising from a physical condition on or off site; and

We note, initially, our uncertainty whether the county in fact applied RLDC 50.120 in issuing the challenged June 6, 2005 development permit. The record has not been filed in this appeal, and it may be that the record before the decision maker includes documents indicating that intervenors applied for a modification of Condition 16 as required by RLDC 50.120(B) and that staff determined whether Condition 16 as it applies to the subject property should be modified under the standards at RLDC 50.120(A)(1) and (2). If so, no party has attached such documents to any pleading or asserted that such documents exist. Attached to the notice of intent to appeal is the challenged June 6, 2005 development permit, which is a one-page "check-off" sheet signed by a county planner. That June 6, 2005 development permit does not mention Condition 16 or RLDC 50.120 and evinces no suggestion that the county in fact applied RLDC 50.120 or recognized that a modification to Condition 16 was necessary in order to approve a homesite north of the canal.

In any case, assuming that county staff in fact modified Condition 16 pursuant to RLDC 50.120, we agree with petitioners that determinations under RLDC 50.120 may in

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"2. The complication prevents performance of the condition.

"B. The developer shall file a request for a modification with the Director. The request shall be in writing and shall set forth in detail the complication necessitating modification or change, why the complication was unanticipated, identify the condition to be modified, and demonstrate why performance of the condition is prevented. The request shall be accompanied by a pre-application fee.

"C. A decision by the Director to modify or not modify a condition or conditions shall be processed using ministerial review procedures as set forth in Article 22. The Director is authorized to refer any request for modification of a condition of approval to a hearing body for a decision. Requests referred to a public hearing shall require a fee equivalent to the original application fee."

[3] The planner's affidavit states, in relevant part:

"The decision to issue the development permit was a ministerial act, performed under the provisions of the Oregon state statutes and the Josephine County RLDC. The staff of the County Planning Department made the decision in this matter according to [RLDC] 22.030, which describes ministerial actions, and RLDC Section 50.120, which allows modification of development plans. * * *" Affidavit of Lora Glover 2.

many cases result in a decision that does not fall within either of the exceptions to LUBA's jurisdiction at ORS 197.015(11)(b)(A) and (B).

The county asserts that the June 6, 2005 decision "was a ministerial act not within the definition of land use decision," but does not explain why the decision fits within either ORS 197.015(11)(b)(A) and (B). With respect to ORS 197.015(11)(b)(A), we cannot say as a general matter that the standards at RLDC 50.120 "do not require interpretation or the exercise of policy or legal judgment." To obtain a modification under RLCD 50.120, the applicant must submit detailed writings describing a complication that exists in the performance of a condition of approval, why the complication results from an "unanticipated circumstance arising from a physical condition on or off site," and why the complication prevents performance of the condition. The director is authorized to approve the requested modification if he determines that the requisite circumstances exist. Notably, the director may refer a modification request to a public hearing, requiring a fee equivalent to the original application fee, which suggests that at least some modification requests may require more discretion than the director is authorized to exercise using the "ministerial review procedures" at RLDC 22.030.

While there may be modification requests under RLDC 50.120 that do not require interpretation or exercise of policy or legal judgment, we do not see that the disputed modification is among them. Condition 16 requires that all homesites be located south of the irrigation canal, presumably to ensure compliance with some applicable legal requirement. The record before us includes no information justifying the modification, and it is not clear what the "complication" is, why it was unanticipated, how it arises from physical conditions on or off site, or why the complication prevents performance of Condition 16. However, in the abstract, any determination that such circumstances exist and that Condition 16 should be modified would seem to likely require some interpretation of at least the criteria in RLDC 50.120. For example, determining whether a "complication" arises from "physical

conditions" on or off-site, whether that complication was "unanticipated" in the 1992 partition decision, and why that complication "prevents" performance of Condition 16 would likely require some interpretation of the quoted terms in the present case, none of which are clear and objective or susceptible to only one meaning. *See Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000) (building permit standard measuring height of building from the "finished surface of the ground" is ambiguous and therefore building permit does not fall within the scope of either ORS 197.015(11)(b)(A) or (B)).

With respect to ORS 197.015(11)(b)(B), it is not clear that a decision that includes a modification of a condition of partition approval is accurately described as a mere "building permit." Assuming without deciding that it is, the county does not assert that the standards for a modification under RLCD 50.120 are "clear and objective," and for the reasons set above we do not see that they are.

Because the county apparently applied RLDC 50.120 in approving the challenged decision, and because the criteria in RLDC 50.120 are not clear and objective and appear to require interpretation under the present circumstances, we disagree with the county that the challenged decision falls within either of the ministerial exceptions to LUBA's jurisdiction, at ORS 197.015(11)(b)(A) and (B).

B. Timely Appeal

Petitioners filed their appeal on May 4, 2006, almost a year following approval of the challenged development permit. The county moves to dismiss this appeal as untimely, arguing that the appeal was filed more than 21 days after the June 6, 2005 decision became final. ORS 197.830(9).[4] The county notes that petitioners appear to rely instead on ORS 197.830(3), which provides alternative deadlines for filing a notice of intent to appeal

[4] ORS 19.830(9) provides, in relevant part:

> "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. * * *"

when the local government makes a land use decision without providing a hearing, under specified circumstances.[5] Under ORS 197.830(3), a person who is adversely affected by such a decision may appeal the decision within 21 days of actual notice, where notice is required, or within 21 days of the date the person knew or should have known of the decision, where notice is not required. The county argues that petitioners had actual notice, or knew or should have known, of the challenged decision, more than 21 days prior to filing the notice of intent to appeal, and thus the appeal is untimely under either ORS 197.830(3)(a) or (b). In response, petitioners argue that the deadlines for filing this appeal are governed by ORS 197.830(3)(a), and that the appeal was timely filed under that provision.

1. Notice of the Decision

Whether the "actual notice" standard in ORS 197.830(3)(a) applies or the "knew or should have known" standard in ORS 197.830(3)(b) applies depends on whether "notice was required" and if so whether petitioners or some petitioners were entitled to receive such notice. *See Frymark v. Tillamook County*, 45 Or LUBA 685, 696-698 (2003) and *Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 391 (2000) (discussing differences between ORS 197.830(3)(a) and (b)).

Petitioners' argument as to why "notice [was] required" in issuing the June 6, 2005 development permit and therefore why ORS 197.830(3)(a) rather than 197.830(3)(b) applies

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[5] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 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 the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

is difficult to follow. Petitioners appear to believe that because the 1992 partition decision was rendered by a hearings officer following a public hearing, the county is obligated to provide a similar notice and hearing process for subsequent development permits that are inconsistent with or that modify a partition condition of approval. However, the legal basis for that assertion is not stated. The closest petitioners come is to assert that "ORS 215.416 and ORS 197.763" required the county to issue notice of the June 6, 2005 development permit decision to petitioners.[6] ORS 215.416 sets out the procedures applicable when a county makes a "permit" decision, which is defined at ORS 215.402(4) to mean "discretionary approval of a proposed development of land" under county land use regulations. *Id.* Pursuant to ORS 215.416, a county must either hold a hearing on a statutory "permit" or make a decision without a hearing, provided that the county notifies persons entitled to notice of the decision and offers an opportunity to file a local appeal to a hearings officer. ORS 215.416(3), (11). Any hearing conducted under ORS 215.416(3) or (11) must comply with the procedural requirements of ORS 197.763, which in relevant part require the county to provide notice of the hearing to persons entitled to notice.

Petitioners do not explain why the June 6, 2005 development permit is a statutory "permit" as defined at ORS 215.402(4), that is, why the permit constitutes the "discretionary approval of a proposed development of land" under county land use regulations. *See Tirumali v. City of Portland*, 41 Or LUBA 231, 240-42 (2002) (discussing the kind and

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[6] Petitioners argue:

> "When in March 21, 2006 a height variance was noticed to the neighbors, it became apparent, that a structure had been allowed by the County through issuing the development permit submitted with the NITA earlier. When the neighbors protested, the County did not recall the permit and [make] the argument: the planning director is entitled to overwrite a quasi-judicial decision of a Hearing Officer made in public session with his administrative decision power. It is this decision of the Planning Director, which was not noticed (as required by ORS 215.416 and ORS 197.763) nor was this decision (issuing the development permit) put in the form of a Notice of Decision (as required by ORS 215.416 and/or 197.830). This is appealed to LUBA. This decision was simply treated as an administrative function striking down a quasi-judicial decision of a Hearing Officer after a public hearing." Objection to Motion to Dismiss 3 (exhibit reference omitted).

degree of discretion necessary to constitute a "permit" decision under the statutory cognate to ORS 215.402(4) applicable to cities). It may well be that in applying RLDC 50.120 to modify or remove Condition 16 the city exercised the kind of discretion that distinguishes a statutory "permit" from other types of permits. However, if so, petitioners make no effort to demonstrate that such is the case. It is petitioners' burden to establish that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 705 P2d 232 (1985); *Bowen v. City of Dunes City*, 28 Or LUBA 324, 330 (1994). Absent some argument or explanation from petitioners to support their apparent belief that the challenged development permit is a statutory "permit" decision as defined at ORS 215.402(4), we decline to presume that it is. Accordingly, petitioners have not established that "ORS 215.416 and ORS 197.763" require that the county provide notice of the June 6, 2005 decision to petitioners, who would be entitled to notice if the county were making a statutory permit decision.

Because petitioners identify no other source of an obligation for the county to provide notice of the decision to petitioners, we conclude that the present case is not one where "notice is required" for purposes of ORS 197.830(3)(a). Instead, this is a circumstance where "notice is not required," and therefore the relevant jurisdictional question is whether petitioners have established that they filed the notice of intent to appeal within 21 days of the date that petitioners "knew or should have known of the decision," under ORS 197.830(3)(b).

2. Knew or Should Have Known

As we explained in *Frymark*, the "knew or should have known" standard in ORS 197.830(3)(b) encompasses subjective and imputed knowledge of the decision, as distinct from "actual notice," which we construed to mean actual written notice of a decision. The imputed or constructive knowledge under ORS 197.830(3)(b) includes what is essentially "inquiry notice." In *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002), we reviewed a number of cases applying ORS 197.830(3)(b), and concluded that:

> "it is clear under ORS 197.830(3)(b) that where a petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision, the petitioner is placed on inquiry notice. If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice." 42 Or LUBA at 616.

Here, the county cites to the following circumstances as evidence that the petitioners knew or should have known of the June 6, 2005 decision more than 21 days prior to filing the notice of intent to appeal. First, the county argues that the January 21, 2005 letter was mailed to petitioners, and that letter specifically informed petitioners that the applicants wished to locate the dwelling north of the irrigation canal rather than south. The map accompanying that letter depicts the proposed dwelling north of the canal.

Second, the county argues that the March 21, 2006 notice of the height variance application was mailed to petitioners, and reasonably informed them that the applicants sought to obtain a height variance for a dwelling on the property. The March 21, 2006 notice invites petitioners to "review the file" and advises that a copy of the application is available for inspection at the planning office. While the March 21, 2006 notice did not specify that on June 6, 2005, the county had approved the dwelling for which a height variance was now being sought, or that the dwelling would be located north of the canal, we understand the county to argue that between the January 21, 2005 letter and the March 21, 2006 notice petitioners had sufficient information to put a reasonable person on at least "inquiry notice" that the county had approved a dwelling on the subject property and, moreover, a dwelling north of the canal. Had petitioners made timely inquiries, we understand the county to argue, petitioners would have discovered the June 6, 2005 decision, confirming both that the city had approved a dwelling and the location of that dwelling. However, the county argues, petitioners did not file the notice of intent to appeal until six weeks after the county mailed the March 21, 2006 notice, and therefore the notice was untimely filed.

As noted, petitioners dispute, by affidavit, that any of them received the January 21, 2005 letter when it was mailed. According to petitioners, they did not actually receive a copy of the January 21, 2005 letter until after the city faxed it to intervenor-petitioner on April 27, 2006, and intervenor-petitioner made copies available to petitioners. Petitioners base all of their arguments on the "actual notice" standard of ORS 197.830(3)(a) and do not directly address the "knew or should have known" standard of ORS 197.830(3)(b). Nonetheless, we understand petitioners to argue that the earliest date that they can be charged with subjective or constructive knowledge of the decision based on information in the January 21, 2005 letter is on the date they actually received that letter, April 27, 2006, which is within 21 days of the date the notice of intent to appeal was filed.

Petitioners repeatedly emphasize that they did not know and could not reasonably suspect that the county had approved the dwelling at a location north of the canal, until intervenor-petitioner received the January 21, 2005 letter by fax on April 27, 2006, after which petitioners apparently realized that the June 6, 2005 permit authorized the dwelling at the location indicated in the January 21, 2005 letter and the map attached to that letter. In our view, whether the petitioners knew or should have known of the specific location of the dwelling north of the canal is less critical, if it is relevant at all. For purposes of inquiry notice under ORS 197.830(3)(b), it is whether petitioners knew or should have known of the "decision," *i.e.*, that the county had approved development, in this case a dwelling and accessory structure, on the subject property. It is not necessary that petitioners know the particular detail of the proposed development that appears to offend them.[7]

[7] For example, a person who observes construction of a dwelling on the subject property is placed on at least inquiry notice that the local government has approved construction of a dwelling. That the person may not know how tall the finished structure will be is immaterial. A person in that circumstance who is offended by the height of the dwelling could not wait until the roof of the dwelling is complete, and its height apparent, before the obligation to take steps to discover and make a timely appeal of the underlying decision is triggered. That obligation is triggered by receipt of information sufficient to inform a reasonable person that the local government has made a decision approving development on the property.

As far as petitioners advise, the only relevant information conveyed by the January 21, 2005 letter is the location of the proposed dwelling north of the canal. Because that information is of minimal if any relevance to the jurisdictional question, we find it unnecessary to resolve the parties' contentions over whether and when the petitioners received the January 21, 2005 letter.

As noted, if a petitioner observes activities or gains information that would lead a reasonable person to suspect that the county had approved development on the subject property, it is incumbent on that petitioner to make timely inquiries, including investigating the county's planning file, as the March 21, 2006 notice invited petitioners to do. Here, it is undisputed that (1) as early as 2004 petitioners were aware that a dwelling had been proposed on the subject property, and (2) on March 21, 2006, all petitioners received written notice seeking comments on intervenor's application for a height variance for a dwelling on the subject property. Given that information, as of March 21, 2006 a reasonable person would be placed on at least inquiry notice that the county had approved a dwelling on the subject property. Indeed, petitioners admit that the March 21, 2006 notice made it "apparent" that "a structure had been allowed by the County[.]" Objection to Motion to Dismiss 3, quoted at n 6. While petitioners may have been unaware of the specific location of the approved dwelling on that date, as discussed above we do not believe knowledge of the specific location of the dwelling is necessary to place petitioners on inquiry notice that the county had approved a dwelling on the property.

The only remaining question is whether petitioners made timely inquiries leading to discovery of the June 6, 2005 decision. If so, the 21-day clock under ORS 197.830(3)(b) begins on the date they discovered the June 6, 2005 decision. However, if petitioners failed to make timely inquiries, then the 21-day clock begins on March 21, 2006, the date they were placed on inquiry notice. *Rogers*, 42 Or LUBA at 616.

Petitioners do not advise us of any actions they took following March 21, 2006 to discover the June 6, 2005 decision. That alone makes it difficult to agree with petitioners that their appeal is timely under ORS 197.830(3). *See Cutsforth v. City of Albany*, 199 Or App 442, 446-47, 112 P3d 395 (2005) (the petitioners' failure to provide evidence regarding when they learned of the appealed decision leaves LUBA without evidence to support a conclusion that the appeal is timely under ORS 197.830(3)(b)).

The only party that makes any attempt to describe how he learned of the challenged decision is intervenor-petitioner. Intervenor-petitioner was not entitled to notice of the height variance application, and did not receive the March 21, 2006 notice. Instead intervenor-petitioner states that he learned about the height variance application on the county's web site on or about March 22, 2006. Intervenor-petitioner requested information from the county by e-mail, and received some information on March 23, 2006. Approximately one month later, intervenor-petitioner requested additional information from the county, and received a copy of the January 21, 2005 letter by fax on April 26, 2006. Apparently, at that point intervenor-petitioner realized that the proposed dwelling is located north rather than south of the canal, and thereafter sought and obtained a copy of the June 6, 2005 development permit that approved the dwelling north of the canal. A copy of the June 6, 2005 permit was attached to the notice of intent to appeal when filed May 4, 2006. Presumably, sometime between April 26, 2006 and May 4, 2006, intervenor-petitioner contacted the petitioners and informed them that the June 6, 2006 decision approved the dwelling location north of the canal.

The knowledge and actions of intervenor-petitioner are not directly indicative of the knowledge and actions of the petitioners, for purposes of ORS 197.830(3)(b). As far as we are informed, petitioners themselves did nothing between March 21, 2006 to April 26, 2006, a period of more than a month, to find out anything about the decision that approved the dwelling for which a height variance was sought. During that time, petitioners admit that

they knew based on the March 21, 2006 notice that the county had approved a dwelling on the subject property. The March 21, 2006 notice invited petitioners to view the planning file, investigation of which would presumably have led petitioners to the June 6, 2005 decision authorizing the dwelling for which the height variance was sought, but we are not told that petitioners took any such actions.

Even if the actions of intervenor-petitioner are somehow imputed to petitioners, those actions fall short of constituting timely inquiry, in our view. Intervenor-petitioner, like petitioners, apparently knew as early as March 22, 2006, that the county had approved a dwelling on the subject property, although intervenor-petitioner was allegedly ignorant of the location of that dwelling. While intervenor-petitioner made various inquiries in aid of his objections to the proposed height variance, intervenor-petitioner does not inform us of any steps he took to inquire into the decision that approved the dwelling itself, until after April 26, 2006, four to five weeks after the latest date on which intervenor-petitioner knew or should have known that the county had approved a dwelling.

In sum, petitioners do not explain why a four to five week delay in acting on their knowledge that the county had approved a dwelling on the subject property is consistent with the obligation to conduct a timely inquiry for purposes of ORS 197.830(3)(b). *See Abadi v. Washington County*, 35 Or LUBA 67, 72-73 (1998) (an appeal is untimely filed under ORS 197.830(3)(b) where there is a delay of one month between the date a petitioner learns that the local government approved a grading permit and the appeal of that permit). Accordingly, the deadline to file an appeal of the June 6, 2005 decision began running on approximately March 21, 2006, the date petitioners were placed on at least inquiry notice that the county had approved a dwelling on the property. The notice of intent to appeal was filed considerably more than 21 days from that date, and is therefore untimely.

MOTION TO TRANSFER

In the notice of intent to appeal, petitioners request that this appeal be transferred to circuit court, pursuant to OAR 661-010-0075(12), in the event LUBA concludes that the challenged decision is not a land use decision. As explained above, the challenged decision is a land use decision, although petitioners' appeal of that decision was untimely. When an appeal is dismissed as untimely, a transfer to circuit court is not appropriate. *Miner v. Clatsop County*, 46 Or LUBA 467, 479 (2004). Accordingly, the motion to transfer is denied.

The appeal is dismissed.