BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SALEM GOLF CLUB, INC.,
Petitioner,

vs.

CITY OF SALEM,
Respondent.

LUBA No. 2008-165

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Christopher B. Matheny, Salem, represented petitioner.

Daniel E. Atchison, Assistant City Attorney, Salem, represented respondent.

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

DISMISSED 02/12/2009

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

Petitioner appeals a city annexation that amended the plan and zoning designation of petitioner's property.

FACTS

Petitioner owns two adjacent parcels. The larger parcel is approximately 120 acres and consists of the Salem Golf Course. The smaller parcel is approximately 20 acres and contains a residence. In 1989 the city annexed both properties into the city and changed the plan and zoning designations from county designations to city plan designations of Parks Open Space and Outdoor Recreation and city zoning designations of Public Amusement (PA). The county plan designation for both properties had been Parks and Recreation, but while the Salem Golf Course parcel was zoned county Public Amusement the smaller parcel was zoned county Residential Acreage.

MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD

Both petitioner and the city move LUBA to take evidence outside of the record. Generally, LUBA will not consider evidence outside of the record absent a motion pursuant to OAR 661-010-0045, however, we will consider such evidence for the limited purpose of determining jurisdiction without the necessity of ruling on a motion to take evidence outside of the record. *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000). Neither party disputes the accuracy of the extra-record evidence submitted by the other party, but rather only the relevance or significance of the evidence. We therefore will consider the submitted evidence for the limited purpose of determining jurisdiction.

MOTION TO DISMISS

The city moves to dismiss this appeal on multiple bases. We conclude that one basis is dispositive and therefore do not consider the city's other arguments for dismissing the appeal. As discussed, the challenged decision was adopted in 1989, and petitioner's appeal

to LUBA is well after the 21-day deadline generally required by ORS 197.830(9). Petitioner argues that the appeal is timely under ORS 197.830(3) because it was filed within 21 days of petitioner learning of the decision.[1] Even if petitioner is correct that the appeal was filed within 21 days of petitioner learning of the decision, if the appeal is not timely under the ORS 197.830(6) statute of ultimate repose then the appeal must be dismissed.

ORS 197.830(6) provides:

> "(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in subsections (3), (4) and (5) of this section shall not exceed three years after the date of the decision.
>
> "(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

Because the challenged decision was made almost 20 years ago, ORS 197.830(6) requires that we dismiss this appeal unless the exception set forth in ORS 197.830(6)(b) applies. As we explained in *Kamp v. Washington County*, 51 Or LUBA 670, 678 (2006):

> "* * * we read ORS 197.830(6)(b) to apply to circumstances where the local government fails to provide either (1) a 'notice of a hearing' required by ORS 197.763 or (2) notice of an 'administrative decision' required by ORS 197.195. Failure to provide notices required by other statutes, or by local codes, do not provide an exception to the three-year statute of ultimate repose."

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[1] 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:
>
> "(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."

Notice of administrative decisions required by ORS 197.195 concerns limited land use decisions and is not applicable to the present case. Thus, in order to avoid the statute of ultimate repose, petitioner must establish that the city failed to provide a notice of a hearing regarding the annexation of the subject property. We quote petitioner's entire response to the city's statute of ultimate repose argument for dismissing the appeal.

> "The city also argues that the three-year limitation period in ORS 197.830(6)(a) applies because 'petitioner received notice of the hearing.' Again, the city is wrong because the city did not provide notice that the city intended to change the zoning of the subject property from RA to PA in 1989. ORS 197.763(2) and (3) required notice of the change in zoning from RA to PA. The city's failure to provide the required notice makes paragraph (b) of ORS 197.830(6) applicable and paragraph (a) inapplicable." Response to Motion to Dismiss 13.

The recurring theme of petitioner's arguments is that the city did not provide proper notice of what it was doing when it annexed petitioner's property. According to petitioner, the city's policy in 1989 when annexing properties was to assign a comprehensive plan and zoning designation that most closely approximated the existing plan and zoning for the properties under the county's jurisdiction. Therefore, because the 20-acre property was zoned RA by the county, the city should not have zoned the 20 acres PA but rather RA. Petitioner argues that the city was confused about petitioner's property and assumed in 1989 that both parcels were zoned PA by the county and did not realize that the 20-acre parcel was not zoned PA by the county. Petitioner explains that due to this misunderstanding, the city assumed the entire property was the golf course and all city actions regarding the annexation, including the notice, hearing, staff report, and decision all stated that the city was rezoning petitioner's property from county PA to city PA. According to petitioner, because the city never stated or explained that it was rezoning the 20-acre part of petitioner's property from county RA to city PA, the city did not provide notice of the decision.

Even assuming petitioner is correct about all of the preceding, that does not mean the city did not provide notice of the hearing on annexation. There is no dispute that the city

provided notice of the hearing on annexation that resulted in petitioner's property being annexed into the city. Record 136-38. There is no dispute that petitioner received the notice and appeared at the hearing and testified in opposition to annexation. There is also no dispute that the 1989 annexation decision annexed both of petitioner's properties into the city and rezoned those properties city PA. While petitioner may well have been unaware until recently what the entire results of the 1989 annexation were, there is no dispute that that is what occurred. Therefore, petitioner is simply incorrect that the city did not provide notice of the hearing.

While petitioner does not specifically make the argument, what it essentially argues is that the notice of the hearing did not adequately describe the city's ultimate actions. ORS 197.830(3) provides an exception to the 21-day time limit for appealing to LUBA when a "local government makes a 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." *See* n 1. If petitioner had appealed the decision in 1990, for instance, it might possibly have qualified for an exception to the 21-day time limit under ORS 197.830(3). The ORS 197.830(6) statute of ultimate repose, however, specifically states that such exceptions under ORS 197.830(3) "shall not exceed three years after the date of the decision." While ORS 197.830(6)(b) makes an exception to the three year statute of ultimate repose when notice of a hearing is not provided, it does not provide an exception when notice of the hearing is provided but that notice did not adequately describe the local government's final actions. Because the city did provide notice of the hearing, even if that notice did not accurately describe all aspects of the ultimate decision, the three year statute of ultimate repose applies. Because petitioner's appeal is long past the three year statute of ultimate repose, this appeal must be dismissed.

Accordingly, this appeal is dismissed.