BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FEB26'10 AM 9:59 LUBA

PLAID PANTRIES, INC.,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

PACIFIC REALTY ASSOCIATES, LP,
Intervenor-Respondent.

LUBA Nos. 2009-078 and 2009-079

PACIFIC CROSSROADS PROPERTIES, INC.,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

PACIFIC REALTY ASSOCIATES, LP,
Intervenor-Respondent.

LUBA No. 2009-081

WALTER S. AMAN CREDIT SHELTER TRUST,
WALTER S. AMAN SPECIAL OREGON Q-TIP TRUST,
WALTER S. AMAN MARITAL TRUST and
STEPHEN D. AMAN, TRUSTEE,
Petitioners,

vs.

CITY OF TIGARD,
Respondent.

LUBA Nos. 2009-091 and 2009-092

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Michael J. Lilly, Portland, represented petitioners Plaid Pantries, Inc., and Walter S. Aman Credit Shelter Trust, Walter S. Aman Special Oregon Q-Tip Trust, Walter S. Aman Marital Trust, and Stephen D. Aman, Trustee.

Steven W. Abel, Portland, represented petitioner Pacific Crossroads Properties, Inc.

Timothy V. Ramis and Damien R. Hall, Portland, represented respondent.

Steven L. Pfeiffer and Corinne S. Celko, Portland, represented intervenor-respondent.

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

LUBA NOS. 2009-079, 2009-081 and 2009-092	DISMISSED	02/26/2010
LUBA NOS. 2009-078 and 2009-091	AFFIRMED	02/26/2010

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

Opinion by Ryan.

NATURE OF THE DECISIONS

The decision challenged in LUBA Nos. 2009-079, 2009-081, and 2009-092 is a decision by the city's planning commission approving an application for planned development review. In this opinion we refer to that decision as the "development review decision." The decisions challenged in LUBA Nos. 2009-078 and 2009-091 are two separate decisions issued by the city that rejected attempted local appeals to the city council of the same planning commission decision by petitioner Plaid Pantries and petitioners Walter S. Aman Credit Shelter Trust, Walter S. Aman Special Oregon Q-Tip Trust, Walter S. Aman Marital Trust and Stephen D. Aman, Trustee (together, the Aman Petitioners). In this opinion we refer to those decisions as the "local appeal decisions."

DEVELOPMENT REVIEW DECISION (LUBA NOS. 2009-079, 2009-081, 2009-092)

A. Background

Intervenor-respondent Pacific Realty Associates, LP (PacTrust) applied for detailed development plan review approval in order to develop a Target retail store and other retail buildings on an approximately 18-acre parcel. PacTrust's property fronts Dartmouth Street and is located in a triangle-shaped area known as the "Tigard Triangle" that is bounded by Oregon Highway 217 to the southwest, Oregon Highway 99W to the northwest, and SW 72nd Avenue to the east. Petitioners own or lease property located on the north side of Highway 99W, near its intersection with Dartmouth Street, just outside the Tigard Triangle.

The Oregon Department of Transportation (ODOT) recommended traffic improvements to several impacted traffic facilities in order to mitigate the impact of the proposed development. One of those recommendations involved adding a third westbound traffic lane on Highway 99W beginning a short distance northeast of the Highway 99W intersection with SW 72nd Avenue, extending southwest through Highway 99W's intersection with SW Dartmouth Street to Highway 217. That recommendation also included a

requirement that a raised concrete median be installed for all unsignalized intersections between SW 72nd Avenue and Highway 217 to prevent left turns at those unsignalized intersections. Petitioners Plaid Pantries and the Aman Petitioners claim to own or lease property located within 100 feet of the Highway 99W improvements, and petitioner Pacific Crossroads claims to own property located within 500 feet of the Highway 99W improvements. As far as we are aware, none of the petitioners' properties are located within 100 feet or 500 feet of the 18-acre property that is the subject of the development review decision.

The planning commission held hearings on the application and approved it with conditions, including that the applicant construct the above described traffic improvements and several other traffic improvements in the area. None of the petitioners were provided with notice of the planning commission hearings.

B. Motion to Dismiss

PacTrust and the city (together, respondents) move to dismiss the appeals of the planning commission's development review decision, arguing that petitioners' notices of intent to appeal were not timely filed under ORS 197.830(9). Petitioners' notices of intent to appeal the planning commission decision were filed with LUBA approximately six weeks after the challenged development review decision became final. ORS 197.830(9) governs the time for filing appeals of land use decisions and 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. * * *"

Petitioners do not argue that the notices of intent to appeal were timely filed if the 21-day deadline established in ORS 197.830(9) applies. Rather, petitioners respond that the delay in filing the notice of intent to appeal is excused by ORS 197.830(3), which provides:

> "If a 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 [LUBA] 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."

We have explained:

> "Where ORS 197.830(3) applies, it generally applies to land use decisions made without a hearing. However, by its terms and as a matter of interpretation by this Board, it potentially applies to two narrow circumstances where a local government in fact provides a hearing. * * * Second, ORS 197.830(3) can apply where the local government fails to provide notice of hearing to a person entitled to that notice under state or local law, and due to that failure the person does not appear at the hearing and thereby become entitled to notice of the decision. *Leonard v. Union County*, 24 Or LUBA 362, 374-76 (1992), *overruled in part Orenco Neighborhood v. City of Hillsboro,* 135 Or App 428, 899 P2d 720 (1995)." *Cutsforth v. City of Albany*, 48 Or LUBA 304, 315 (2004), *aff'd* 199 Or App 442, 112 P3d 395 (2005).

In *Orenco Neighborhood*, the Court of Appeals held that ORS 197.830(3) does not apply, under the reasoning in *Leonard*, where the petitioner is only entitled to notice of the hearing on a post-acknowledgment plan amendment under local law, and was not entitled to notice of the hearing under applicable state statutes.[1] 135 Or App at 432. For purposes of this opinion, we assume that the holding in *Leonard* remains valid for persons who were entitled to notice of hearing under applicable statutes, but were not given the notice required by statute.

Petitioner Pacific Crossroads argues that it was entitled to notice of the hearing under Tigard Development Code (TDC) 18.290.050.C.1.a because its property is located within 500 feet of the Highway 99W improvements described above.[2] We understand petitioner Pacific Crossroads to rely solely on the notice provision found at TDC 18.290.050.C.1, and we do

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[1] The court declined to address whether *Leonard* was correctly decided, as applied to other circumstances, such as where the petitioner is entitled to notice of a hearing under state law.

[2] TDC 18.290.050.C.1.a provides in relevant part that notice of a hearing must be sent to "all owners of record within 500 feet of the subject site." TDC 18.120.030.128 defines "site" as "[a]ny plot or parcel of land or combination of contiguous lots or parcels of land."

1 not understand petitioner Pacific Crossroads to argue that it was entitled to notice of the
2 planning commission's hearing under the applicable subsection of ORS 197.763, which we
3 discuss below. Under *Orenco Neighborhood*, petitioner Pacific Crossroads is not entitled to
4 rely on ORS 197.830(3) and its NITA was not timely filed.

5 Petitioners Plaid Pantries and the Aman Petitioners argue that in addition to being
6 entitled to notice under TDC 18.390.050.C.1 they were also entitled to notice of the planning
7 commission hearing under ORS 197.763(2)(a). ORS 197.763(2)(a)(A) provides in relevant
8 part that notice of quasi-judicial land use hearings shall be provided to owners of record of
9 property that is located "[w]ithin 100 feet of the property which is the subject of the notice
10 where the subject property is wholly or in part within an urban growth boundary * * *."

11 Petitioners Plaid Pantries and the Aman Petitioners argue that the phrase "the property
12 that is the subject of the notice" used in ORS 197.763(2)(a)(A) includes the proposed
13 improvements to Highway 99W that are near petitioners' properties.[3] In support of their
14 contention, petitioners rely on our decisions in *Shrader v. Deschutes County*, 39 Or LUBA
15 782 (2001), and *Warrick v. Josephine County*, 36 Or LUBA 81 (1999). *Warrick* involved a
16 challenge to a proposed subdivision on a 120-acre parcel that was north of and adjacent to a
17 Bureau of Land Management (BLM)-managed parcel. The proposed tentative plat showed a
18 right-of-way running south from the southern part of the subject property through the BLM
19 parcel to connect to a public road that transversed another subdivision. We held:

20 "The property that is the 'subject of the notice,' within the meaning of
21 ORS 197.763(2)(a), depends on the proposal before the county. If the
22 application proposes development on more than one parcel of property, then
23 all those parcels of property are, or should be, property which is the 'subject of
24 the notice,' and property owners within the specified distances of such
25 property are entitled to notice. In the present case, the applicants proposed
26 development on their parcel and on part of the BLM parcel. Accordingly, we

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[3] Petitioner Plaid Pantries is the lessee of property. Because no party argues that the term "owners of record" as used in both ORS 197.763(2)(a)(A) and TDC 18.390.050.C.1 does not include a lessee of property, we assume that petitioner Plaid Panties is an "owner of record."

> conclude that, under the circumstances presented in this case, the county was required to provide notice to property owners within the appropriate distance from the applicants' parcel, pursuant to ORS 197.763(2)(a)(B), and the BLM parcel, pursuant to ORS 197.763(2)(a)(C)." *Id.* at 86-87.

We noted that in the particular factual circumstances at issue in that appeal, the applicants proposed to acquire property rights in the BLM parcel and develop part of that parcel in developing the disputed subdivision, and that those particular facts led us to conclude that the property that was the subject of the notice under ORS 197.763(2)(a)(C) included the BLM parcel. We specifically left open the question that is presented in the present appeals, whether ORS 197.763(2)(a) applies where a proposal does not involve acquisition of property rights in or development of another parcel. *Id.* at 87, n 5.

Shrader involved a similar challenge to the county's approval of a destination resort expansion on 480 acres that proposed construction of access roads across BLM land to existing public roads pursuant to a permit issued by BLM. The petitioners owned property within 500 feet of the proposed access roads on BLM land but did not receive notice of the hearing. We denied the county's motion to dismiss, finding that because the proposal to expand the destination resort included the acquisition of a property interest in the adjacent BLM parcel and development of roads on that parcel, the portion of the BLM parcel that contained the proposed access roads was included in the property that is "the subject of the notice" under ORS 197.763(2)(a)(C).

The factual circumstances in the present appeal are not similar to the circumstances present in either *Warrick* or *Shrader*. PacTrust's application sought approval of a detailed development plan on an 18-acre parcel. The development did not require the applicant to secure property or ownership rights in any other parcel, and it did not propose development of any adjacent parcels. The fact that the application proposed mitigation of impacts to several transportation facilities within a large impact area surrounding the property does not mean that the mere mention of those off-site transportation facilities made them part of the

1 "property that is the subject of the notice" under ORS 197.763(2)(a)(A). Accordingly,
2 petitioners Plaid Pantries and the Aman Petitioners were not entitled to notice of the hearing
3 under ORS 197.763(2)(a)(A).

4 Because petitioners Plaid Pantries and the Aman Petitioners were not entitled to
5 notice of the hearing under ORS 197.763(2)(a)(A), they may not rely on the time for filing a
6 notice of intent to appeal a decision made without a hearing under ORS 197.830(3), under the
7 reasoning in *Leonard*. Rather, petitioners Plaid Pantries and the Aman Petitioners, like
8 petitioner Pacific Crossroads, were required to file their notices of intent to appeal the
9 planning commission decision within 21 days of the date the decision became final. ORS
10 197.830(9). It is undisputed that neither of their NITAs were filed within 21 days of the date
11 the planning commission decision became final.

12 Accordingly, the appeals of the development review decision are dismissed.

13 **THE LOCAL APPEAL DECISIONS (LUBA NOS. 2009-078 and 2009-091)**

14 The local appeal decisions challenged in LUBA Nos. 2009-078 and 2009-091 are two
15 separate decisions issued by the city that rejected petitioner Plaid Pantries' and the Aman
16 Petitioners' attempted local appeals to the city council of the planning commission's
17 development review decision. Respondents move to dismiss the appeals of the decisions
18 rejecting petitioners' local appeals. In the alternative, respondents argue that the Board
19 should affirm the city's decisions. Although the briefs have not yet been filed, for the reasons
20 discussed below, the parties' arguments in support of and in response to the motion to
21 dismiss make it clear that the city correctly rejected petitioners' attempted local appeals of the
22 planning commission decision.

23 According to respondents, nothing in the TDC allows the city to accept an appeal of a
24 planning commission decision that is not filed within the time set forth in TDC
25 18.390.050.G.1, and for that reason, the city correctly determined that the appeals were not

1 timely filed and rejected them.[4] Petitioners Plaid Pantries and the Aman Petitioners respond
2 by arguing that "[i]f a citizen has a right to notice under the code, but is deprived of that right
3 by the city's failure to give notice, then the City is failing to give due process of law."
4 Response to Joint Motion to Dismiss 6 (citing *Fasano v. Washington County*, 264 Or 574,
5 507 P2d 23 (1973) and *Doughton v. Douglas County*, 15 Or LUBA 576 (1987)). In that
6 response, we understand petitioners to argue that the city erred in rejecting petitioners' late
7 filing of their local appeal because petitioners were entitled to notice of the hearing under
8 both ORS 197.763(2)(a) and TDC 18.390.050.C.1.a.

9 First, we have already discussed and rejected above petitioners' argument that the city
10 was required to give petitioners notice of the planning commission hearing under ORS
11 197.763(2)(a). Although the argument is put forth in a different context in the appeals of the
12 city's decisions rejecting their local appeals, we reject the argument in the appeals of those
13 decisions as well for the same reasons.

14 Second, we understand petitioners to argue that TDC 18.390.050.C.1.a required the
15 city to provide notice of the hearing to petitioners because their property is located within 500
16 feet of "the site," a phrase which petitioners argue is not limited to the property on which the
17 application proposes development, but also includes property on which off-site
18 improvements must be constructed as a condition of approval, such as the required center
19 divider to be installed along Highway 99W. The city apparently does not share petitioners'
20 expansive view about the meaning of the phrase "the site" in TDC 18.390.050.C.1.a, but the
21 two decisions denying petitioners' local appeals do not include a reviewable interpretation of
22 that language. In that circumstance, ORS 197.829(2) allows LUBA to determine whether the
23 decisions are correct. As noted above, TDC 18.120.030.128 defines "site" as "[a]ny plot or

[4] TDC 18.390.050.G.1 provides that "[a]ny party with standing may appeal a Type III decision to the City Council by filing a Notice of Appeal with the Director within 10 business days of the date notice of the decision is mailed." It is undisputed that the attempted appeals of the planning commission decision to the city council were not filed within 10 business days after the date the notice of decision was mailed.

1 parcel of land or combination of contiguous lots or parcels of land." That definition does not
2 by its terms include improvements to off-site property, and in the present case, fairly distant
3 traffic facilities in which the developer will not hold any possessory or ownership interest.
4 Moreover, TDC 18.120.030.103 specifically defines the term "off-site improvements" as
5 "[i]mprovements required to be made off-site as a result of an application for development
6 and including, but not limited to, road widening and upgrading, storm water facilities, and
7 traffic improvements." Read in conjunction with the definition of "site" that refers to a "plot
8 or parcel of land," we do not agree that the definition of "site" in TDC 18.120.030.128
9 includes the Highway 99W center divider that is not located on or adjacent to PacTrust's
10 property. Therefore, we reject petitioners' argument that their properties are located within
11 500 feet of the "site" under TDC 18.390.050.C.1.a. Petitioners were not entitled to notice of
12 the planning commission hearing under that local code provision.
13 Additionally, petitioners' reliance on *Fasano* and *Doughton* to argue that they were
14 entitled to some constitutionally required notice of the hearing is misplaced. *Fasano* does not
15 operate to give a party an independent constitutional right to notice of a hearing in addition to
16 a statutory or local code right to notice of a hearing. In *Doughton*, the petitioner challenged a
17 permit and argued that he was entitled to notice and a hearing under ORS 215.416. LUBA
18 agreed, and found that where a party is entitled under state law to notice of a hearing but does
19 not receive it, it is both a violation of state law and a denial of due process under the
20 Fourteenth Amendment. In the present appeal, petitioners were not entitled to notice of the
21 hearing under either ORS 197.763(2)(a) or any other statute or local code provision. Thus,
22 *Fasano* and *Doughton* are inapposite.
23 *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994), involved similar
24 circumstances to the present appeal. In *Kevedy*, we affirmed a city decision rejecting a local
25 appeal of a planning director decision filed after the time for filing set forth in the local code.
26 We held that even if the notice of hearing had been inadequate to describe the action taken by

1 the city, any inadequacies in that notice did not provide a basis for suspending local appeal
2 deadlines where the local code did not contain a provision specifically allowing a local appeal
3 in the circumstances presented in ORS 197.830(3). *Id.* at 240. Similarly, in the present
4 appeal, there is no local code provision specifically allowing the city to accept a late-filed
5 appeal.

6 Because nothing in the TDC allowed the city to accept a late-filed local appeal, the
7 city's decisions rejecting those appeals were correct.

8 LUBA Nos. 2009-079, 2009-081 and 2009-092 are dismissed.

9 LUBA Nos. 2009-078 and 2009-091 are affirmed.