BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BONNIE BRODERSEN,
Petitioner,

vs.

CITY OF ASHLAND,
Respondent,

and

WILLIAM McDONALD and LYNN McDONALD,
Intervenors-Respondents.

LUBA No. 2012-056

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Bonnie Brodersen, Ashland, filed the petition for review and represented herself.

David H. Lohman, City Attorney, Ashland, represented respondent.

Mark S. Bartholomew, Medford, filed the response brief and represented intervenors-respondents.

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

DISMISSED 11/08/2012

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 decision approving an encroachment permit to construct a private driveway in a city right-of-way.

MOTION TO INTERVENE

William McDonald and Lynn McDonald (intervenors), the applicants below, move to intervene on the side of the city. There is no opposition to the motion and it is allowed.

INTRODUCTION

As discussed below, the city and intervenors (respondents) move to dismiss this appeal, under three different types of jurisdictional challenges. Each of these jurisdictional challenges present complex issues, and setting out all the relevant facts, arguments and responses to each of these jurisdictional challenges would result in an unnecessarily lengthy and confusing opinion. Accordingly, we focus most of our discussion of the facts and arguments on what appears to be the most straightforward jurisdictional challenge: respondents' argument that the appeal was untimely filed. For the reasons set out below, we agree with respondents that this appeal was untimely filed and that LUBA lacks jurisdiction over the appeal on that basis.

FACTS

The present controversy has a long history. *See generally Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007) (*Brodersen I*), and *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010) (*Brodersen II*), *aff'd* 241 Or App 723, 250 P3d 992 (2011). At the conclusion of *Brodersen II*, the city had approved and LUBA had sustained on appeal a discretionary land use permit necessary for intervenors to construct a driveway to connect their residentially zoned property a short distance through a riparian area to an adjoining city street.

On June 30, 2011, after the Court of Appeals affirmed LUBA's decision, intervenors applied to the city Public Works Department for an encroachment permit. The encroachment permit application requests city permission for intervenors to construct a portion of their driveway over an unimproved area of the right-of-way of Grandview Drive, to connect to the improved portion of that city street. City of Ashland Municipal Code (AMC) 13.02.050 provides that the city public works director may approve an encroachment permit, subject to the standards at AMC 13.02.060. Under AMC 13.02.070, encroachment permits are deemed to be "ministerial" decisions, not land use decisions or decisions subject to the city's land use standards and land use appeal process in AMC chapter 18. Instead, AMC 13.02.080 provides a separate appeal process for encroachment permits, at AMC 2.30.

On September 12, 2011, the city surveyor signed and approved the requested encroachment permit, contingent on issuance of the building permit for intervenors' proposed dwelling, which was then pending before the city. Record 30-33. The city surveyor's signature appears at Record 33, on the last page of the application. Handwritten on the top of page 32 is a permit number for the encroachment permit, "2012-00629."

Petitioner had previously requested that the city provide her with notice of the issuance of any encroachment permit for the disputed driveway. Record 45. On October 3, 2011, the city planning department sent petitioner a letter by certified mail, stating:

> "As you had previously requested notification, I wanted to make you aware that the permit for the McDonald's project at 720 Grandview has been reviewed and approved, and the applicants have been notified that the permit is ready for issuance." Record 29.

On January 30, 2012, the city planning department issued the building permit for intervenors' proposed single family dwelling. As far as we can tell, the city did not provide petitioner notice that the building permit was approved on January 30, 2012.

On June 4, 2012, petitioner wrote the city public works director repeating her request to be notified of the issuance of any encroachment permit. Record 17. On July 6, 2012, the city public works director responded, advising:

> "In response to your June 4, 2012 letter requesting notification of application for an encroachment permit for 720 Grandview, the City of Ashland Public Works Department received and processed a driveway encroachment permit on September 12, 2011 * * *. The City provided notice to you on October 3rd in the form of the attached letter. The building permit was issued on January 30, 2012 and the approved Public Works encroachment permit was finalized as part of the building permit." Record 16.

Petitioner responded by letter dated July 13, 2012, requesting an opportunity to examine the Public Works file concerning the encroachment permit. On the same date, petitioner filed a local appeal of the encroachment permit pursuant to the appeal process at AMC 2.30. On July 18, 2012, the city recorder rejected petitioner's local appeal as untimely filed under AMC 2.30.020(A), which imposes a 10-day deadline to file the notice of local appeal. Record 7. On the same date, July 18, 2012, the city recorder wrote a letter to petitioner responding to her records request, and stating that a copy of the encroachment permit record could be picked up on July 23, 2012.

On August 8, 2012, petitioner filed with LUBA a notice of intent to appeal (NITA) the encroachment permit.[1] As discussed below, there is some uncertainty whether the city issued two encroachment permits, and if so which one petitioner is appealing. In the NITA, petitioner takes the position that the appeal is timely filed under ORS 197.830(3), which as discussed below in certain circumstances allows a petitioner to appeal a land use decision to

---

[1] The NITA states, in relevant part:

> "Notice is hereby given that petitioner intends to appeal that land use decision of respondent to issue an encroachment permit to [intervenors] * * *. It is unclear when the decision of respondent city became final because the Encroachment Permit does not have an 'issued' date. * * * [The] attorney for applicants, signed an application dated 5/10/2012. Petitioner has filed this Notice within the time limits prescribed by ORS 197.830(3). Petitioner received notice of this decision on July 23, 2012, when the City Recorder responded to my request of July 13, 2012 to view documents in the encroachment permit file. * * *" Record 4.

LUBA within 21 days of the date of "actual notice," if notice is required, or within 21 days of the date the petitioner knew or should have known of the decision, if notice is not required.

On September 21, 2012, petitioner filed a petition for review with two assignments of error, which argue that the city erred in processing and approving the encroachment permit. The city and intervenors filed a joint response brief on the merits, but also filed a motion to dismiss this appeal under a number of different theories. For the following reasons, we agree with respondents that we lack jurisdiction over this appeal.

JURISDICTION

A. What is the Challenged Decision?

At the outset, we note that there is some uncertainty regarding what is the decision challenged in this appeal. The obvious candidate is the encroachment permit at Record 30-33, signed by the city surveyor on September 12, 2011. The petition for review does not specifically identify that decision as the subject of the appeal, however, and no copy of the challenged decision is attached to the petition for review, as required by OAR 661-010-0030(4)(e). However, we note that the assignments of error in the petition for review appear to identify the September 12, 2011 decision as the challenged decision. *See* Petition for Review 17 (quoting language from the encroachment permit at Record 31 and arguing that the permit fails to comply with the encroachment permit criteria at AMC 13.02.060).

However, in her responses to the motion to dismiss, petitioner takes the position that the decision challenged in this appeal is a *different* encroachment permit, which petitioner asserts was applied for on May 10, 2012, and which is found at Record 18. That position is consistent with the description of the challenged decision in the NITA, quoted in n 1 above. However, that position is at odds with the arguments in the petition for review, which as noted above appear to identify the September 12, 2011 permit as the challenged decision, and which characterize the document at Record 18 as an application for a new encroachment permit that was never processed and never became final. Petition for Review 21. Because the

jurisdictional issues raised in this appeal require that we identify the challenged decision, we first resolve that threshold question.

We disagree with petitioner that the document at Record 18 is an encroachment permit, or a decision of any kind. The record table of contents describes Record 18 as "Public Right-of-Way Encroachment Permit entry into City's database system." Consistent with that description, the document at Record 18 appears to be a screen shot of a computer database, with fields for various entries, only some of which are filled in. The field for "Description" states "Encroachment permit for driveway. This was subject to approval based on land use approval of PA#2009-726." As far as we can tell, PA#2009-726 is the permit number for the decision at issue in *Brodersen II*. The reference to PA#2009-726 is similar to the language in the September 12, 2011 encroachment permit, subjecting the permit to the "conditions of land use approval PA No. 2009-726." Record 30. The document at Record 18 bears the same permit number, PW-2012-00629, which appears on one of the pages of the September 12, 2011 encroachment permit, at Record 32. Given these indications, in all likelihood the document at Record 18 represents a partially completed database entry for the September 12, 2011 encroachment permit that the city maintains became finalized January 30, 2012.

However, as petitioner suggests, the document at Record 18 could reflect a new application for an encroachment permit, or perhaps a request to extend the September 12, 2011 encroachment permit, because the date field for "Applied" bears the date "05/10/12," which does not match the application date for the September 12, 2011 encroachment permit. However, even if that is the case there is no indication in the record that the city actually made a decision on any such application or request, as there is no signature or other indicia of a decision, or even a signature line. The date field for "Issued" is blank, so there is no way to tell on what date any such new permit or extension might have been "issued." As far as we can tell, the document at Record 18 is merely a screen shot of a database and not a "decision"

of any kind, much less a final decision. *See* OAR 661-010-0010(3) (a decision becomes final for purposes of LUBA's review when it is reduced to writing and bears the necessary signatures of the decision makers). If the document at Record 18 is the object of this appeal, that document does not appear to be a final decision subject to LUBA's jurisdiction.

Because the only candidate in the record for a final decision that is fairly identified in the NITA and the petition for review is the September 12, 2011 encroachment permit, we assume for purposes of resolving the jurisdictional challenge that the September 12, 2011 encroachment permit is the subject of this appeal.

B. Motion to Dismiss

Respondents move to dismiss the appeal of the September 12, 2011 encroachment permit, on three grounds. Respondents first argue that the appeal was untimely filed under the deadlines at either ORS 197.830(9) or ORS 197.830(3).[2] Second, respondents argue that petitioner failed to appeal to LUBA the July 18, 2012 city recorder decision rejecting her local appeal, and thus failed to exhaust all remedies available by right before appealing to LUBA, as required by ORS 197.825(2)(a).[3] Finally, respondents argue that the encroachment permit approval is not a land use decision as defined at ORS 197.015(10)(a), because the permit applies only the regulations at AMC 13.20.060, and does not concern the application of any comprehensive plan provision or land use regulation.[4]

---

[2] As relevant here, ORS 197.830(9) provides that a notice of intent to appeal a land use decision must be filed with LUBA not later than 21 days after the date the decision becomes final. As explained below, in limited circumstances ORS 197.830(3) tolls the deadline for filing an appeal with LUBA to 21 days from "actual notice" of the decision when notice is required, and within 21 days from the date the petitioner knew or should have known of the decision, if notice is not required.

[3] ORS 197.825(2)(a) provides that LUBA's jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

[4] ORS 197.015(10)(a)(A) defines "land use decision" to include, in relevant part

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

As explained above, because we agree with respondents that the appeal was untimely filed, we do not address the jurisdictional arguments based on exhaustion and whether an encroachment permit is a land use decision. For purposes of this analysis, we will assume without deciding that the exhaustion requirement at ORS 197.825(2) does not bar petitioner from directly appealing the encroachment permit to LUBA, and that the encroachment permit is a "land use decision" as defined at ORS 197.015(10)(a). Further, we will assume without deciding that ORS 197.830(3)(a) supplies the applicable deadline for petitioner to appeal the decision to LUBA. Finally, we will assume, again without deciding, that petitioner is correct that she was entitled to "actual notice" of the encroachment permit decision for purposes of ORS 197.830(3)(a).[5]

ORS 197.830(3) provides in relevant part that:

> "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) * * * 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."

"* * * * *

"(ii) A comprehensive plan provision; [or]

"(iii) A land use regulation[.]"

ORS 197.015(11) defines "land use regulation" to mean "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

[5] We understand petitioner to contend that she was entitled to written notice of the decision for purposes of ORS 197.830(3)(a) because (1) she requested it in a letter dated January 7, 2008, found at Record 45, and (2) an encroachment permit issued under the AMC is a "permit" as defined at ORS 227.160(2), and that pursuant to ORS 227.175 she is entitled as an adjoining landowner to written notice of a decision on that ORS 227.160(2) "permit." Both of those contentions are questionable. Nonetheless, we will assume, without deciding, that for purposes of ORS 197.830(3)(a) petitioner was entitled to written notice of the September 12, 2011 encroachment permit.

Petitioner argues that her appeal was timely filed under ORS 197.830(3)(a), because she did not receive "actual notice" of the encroachment permit decision until July 23, 2012, when she obtained a copy of the encroachment permit file from the city. Therefore, petitioner argues, her appeal filed August 8, 2012, was timely filed within 21 days of "actual notice" of the decision.

The flaw in that argument is that even assuming that actual notice to petitioner of the September 12, 2011 decision was required for purposes of ORS 197.830(3)(a), petitioner received actual notice of that decision on July 6, 2012, not on July 23, 2012. As quoted above, on July 6, 2012, the city sent a letter to petitioner advising her that the city had issued the encroachment permit on September 12, 2011, and that permit became finalized on January 30, 2012. Record 16. Petitioner does not explain why the July 6, 2012 letter does not constitute entirely adequate "actual notice" of the September 12, 2011 encroachment permit, for purposes of ORS 197.830(3)(a).[6]

It is sometimes unclear whether a petitioner must pursue a belated local appeal of a decision that was issued without notice or hearing, or whether the petitioner may directly appeal the decision to LUBA. The short answer is that if there is any uncertainty on that point, the petitioner should file *both* a local appeal and a direct appeal to LUBA, and request that the appeal to LUBA be suspended until there is a determination whether the petitioner has a right of local appeal. However, if the petitioner delays filing a direct appeal to LUBA while pursuing a right of local appeal that may turn out not to exist, the petitioner does so at the risk of allowing the deadline to appeal to LUBA to expire. *See, e.g., Smith v. Douglas County*, 98 Or App 379, 382, 780 P2d 232, *rev den* 308 Or 608, 784 P2d 1101 (1989); *Warf v. Coos County*, 42 Or LUBA 84 (2002); *No Casino Association v. City of Lincoln City*, 30

[6] Arguably, the October 3, 2011 letter to petitioner informing her that the city had approved a permit for intervenor's proposed development also constitutes adequate "actual notice" of the September 12, 2011 permit, for purposes of ORS 197.830(3)(a). However, we need not and do not address that question.

Or LUBA 79, 84 (1995); *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or LUBA 636, 640 (1994).

That is essentially what happened in the present case. After receiving the July 6, 2012 letter, petitioner immediately filed a local appeal of the September 12, 2011 encroachment permit, and petitioner did not appeal the city's decision denying that local appeal. But, for whatever reason, petitioner waited until August 8, 2012—32 days later—to file her direct appeal to LUBA. If petitioner had a right to directly appeal the September 12, 2011 decision to LUBA pursuant to ORS 197.830(3)(a), the last date to do so consistent with ORS 197.830(3)(a) was 21 days after July 6, 2012.

Accordingly, we conclude that petitioner's appeal filed on August 8, 2012, was untimely filed, and we lack jurisdiction over the appeal.

C. Other Jurisdictional Issues

In the petition for review, petitioner argues that if the encroachment permit is not a "land use decision" as defined in ORS 197.015(10)(a)(A), it is nonetheless within LUBA's jurisdiction as a "significant impact" land use decision under the reasoning in *Billington v. Polk County*, 299 Or 471, 480, 703 P2d 232 (1985). Our above conclusion that petitioner's appeal was untimely filed makes it unnecessary to consider this question.

Finally, in the response to the motion to dismiss, petitioner takes the position that the September 12, 2011 encroachment permit has expired pursuant to AMC 13.02.090, which provides that an encroachment permit will automatically be revoked if the permittee "fails to begin installation of the allowed encroachment" within 90 days after issuance of the permit, unless an extension is requested prior to expiration of the 90 day period. Petitioner argues that the record includes no evidence that installation commenced within 90 days after issuance or that a request to extend the permit was made within that 90 day period. Petitioner states that if intervenors agree that the September 12, 2011 permit has expired, then petitioner agrees that this appeal should be dismissed without prejudice, as moot.

The record includes no indication one way or another whether installation began within 90 days of issuance or whether intervenors requested an extension prior to the expiration of the 90 day period. We have no reliable basis to determine whether the September 12, 2011 permit has expired. Absent such a basis, we decline to consider petitioner's contentions that this appeal may be moot.

D. Motion to Transfer

In her response to the motion to dismiss, petitioner moves to transfer this appeal to circuit court pursuant to OAR 661-010-0075(11), if LUBA concludes that the challenged decision is not a land use decision subject to LUBA's jurisdiction.[7] However, transfer to circuit court is not appropriate where LUBA concludes that it lacks jurisdiction for other reasons, such as an untimely filed appeal of a land use decision. *Mazorol v. City of Bend*, 52 Or LUBA 136 (2006); *Miner v. Clatsop County*, 46 Or LUBA 467, 479 (2004); *Hammer v. Clackamas County*, 45 Or LUBA 32, 38, *aff'd* 190 Or App 473, 79 P3d 394 (2003). The motion to transfer is denied for that reason.

E. Motions to Take Evidence and Other Motions

Pending before the Board are petitioner's motion to take evidence, petitioners' motion to strike, intervenors' motion to take evidence, and respondents' motions to strike. Because

---

[7] OAR 661-01-0075(11) provides, in relevant part:

> " (a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).
>
> "* * * * *
>
> "(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made."

none of these motions has any bearing on the dispositive jurisdictional issue in this appeal, all of the motions are denied.

The appeal is dismissed.