BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCHNITZER STEEL INDUSTRIES INC.,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

PACIFIC RECYCLING, INC.,
Intervenor-Respondent.

LUBA No. 2012-093/096

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Dana L. Krawczuk, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

No appearance by the City of Eugene.

Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Miller Nash LLP.

Thane W. Tienson, Portland, filed an amicus brief on behalf of Metro Metals Northwest, Inc. With him on the brief were David L. Blount and Landye Bennett Blumstein LLP.

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

DISMISSED 06/20/2013

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

In LUBA No. 2012-093, petitioner appeals a zone verification letter. In LUBA No. 2012-096, petitioner appeals a Land Use Compatibility Statement (LUCS) issued by the city.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to challenges to its standing to appeal the decisions. The reply brief is allowed.

FACTS

Petitioner owns and operates a scrap metal shredder in the city of Portland and receives its supply of scrap metal for shredding from suppliers located along the I-5 corridor, including the Eugene area. Intervenor operates an existing scrap metal recycling facility on property zoned I-3 Heavy Industrial, in the city of Eugene. Intervenor requested verification from the city that the proposed operation of a scrap metal shredder on its property is a permitted use in the I-3 zone. On December 7, 2012, the city issued a zone verification letter to intervenor that concludes that operation of the scrap metal shredder is a permitted use in the I-3 zone. On December 13, 2012, the city issued a LUCS to Lane Regional Air Protection Agency that concludes that the operation and use of the metal shredder is a use allowed outright in the I-3 zone. These appeals followed.

JURISDICTION

Intervenor challenges petitioner's standing to appeal the challenged decisions to LUBA, arguing that petitioner has not demonstrated and cannot demonstrate that it is "adversely affected" by either decision, within the meaning of ORS 197.830(3) or ORS 197.830(5).[1] Most appeals at LUBA are governed by the deadlines and appearance

[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

requirements of ORS 197.830(9) and ORS 197.830(2), which generally apply to land use decisions made after a public hearing. In the present case, the city made the challenged decisions without a hearing. Such decisions are generally governed by different statutes, with different deadlines and standing requirements. Where ORS 197.830(3) and ORS 197.830(5) apply, a person "adversely affected by the decision" may appeal to LUBA certain types of decisions made without a hearing.[2]

Under either ORS 197.830(3) or (5), petitioner must establish that it is "adversely affected" by the decision. That is the threshold issue presented in these appeals. For the reasons that follow, we conclude that petitioner is not a "person adversely affected by the decision[s]" under ORS 197.830(3) and (5).

The requirement that a person who appeals a decision of a local government demonstrate that the person is "adversely affected" by the decision has been, in various

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> 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."

ORS 197.830(5) provides:

> "If a local government makes a limited land use decision which is different from the proposal described in the notice 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."

[2] The appeal requirements and time period for appealing the LUCS are provided in ORS 197.830(3). The December 7, 2012 zone verification letter is a decision that "determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted in the zone * * *," and is therefore subject to LUBA's jurisdiction "in the same manner as a limited land use decision." ORS 227.160(2)(b); ORS 227.175(11)(b). An appeal of a zoning classification decision is subject to the appeal period set out in ORS 197.830(5). ORS 227.175(11)(c).

forms, a part of the statutes governing appeals to LUBA since LUBA was created in 1979. The ORS 197.830(3) "adversely affected" requirement was enacted by the legislature in its present form in 1989. Or Laws 1989, ch 761, § 12. *See n* 3. The statutory changes enacted by the legislature in 1989 created a two-track system, one for appeals of decisions made after a hearing, and the second for appeals of decisions made without a hearing. *See Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 584 (2006) (explaining the provisions of Oregon Laws 1989, chapter 761, section 12). For appeals of decisions made after a hearing, a petitioner must demonstrate that it appeared orally or in writing and filed a notice of intent to appeal within 21 days of the date the decision became final. ORS 197.830(2) and (9). There is no requirement for a petitioner who appeals a decision made after a hearing to demonstrate that petitioner is "adversely affected." After the 21-day period has run without appeal to LUBA, those decisions are final and unappealable.

The second statutory track created in 1989 is for appeals of decisions made without a hearing. The 21-day deadline set out in ORS 197.830(9) for appeals to LUBA is not applicable, and decisions made without a hearing are potentially subject to appeal to LUBA more than 21 days after the date the decision became final. For those decisions, the 21 day period for appealing those decisions begins to run either (1) when the person receives actual notice of the decision under ORS 197.830(3)(a) and (5)(a), if notice is required; or (2) when the person knew or should have known of the decision under ORS 197.830(3)(b) and (5)(b), if no notice is required. But in order to appeal such a decision, a person must show that he timely appealed the decision within the deadlines set out in ORS 197.830(3)(a) or (b) *and* that he is "adversely affected" by the decision.

The requirement that a petitioner at LUBA demonstrate that it is "adversely affected" by the decision has long been interpreted to allow property owners within "sight and sound" of the subject property to appeal a land use decision. *See Casey v. City of Dayton*, 5 Or LUBA 96, 98 (1982) (*citing Van Volkinburg v. Marion County*, 2 Or LUBA 112 (1980), *aff'd*

Merrill v. Van Volkinburg, 54 Or App 873, 636 P2d 466 (1981) (allegation of residence within sight and sound of a property is sufficient to demonstrate adverse affect)). Owners or residents of property within sight and sound of a proposed development are presumed to be affected by a decision. *Goddard v. Jackson County*, 34 Or LUBA 402, 409 (1998); *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996). But a person who does not own property that is within sight and sound of the subject property may still satisfy the requirement to demonstrate that he is adversely affected by the proposed development. In *Jefferson Landfill Committee v. Marion County*, 297 Or 280, 686 P2d 310 (1984), the Supreme Court explained that where a previous version of the statutes governing appeals to LUBA used the phrase "whose interests are adversely affected * * *:"

> "'[A]dversely affected' means that a local land use decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner. *Examples of adverse affects would be noise, odors, increased traffic or potential flooding. See, e.g., Yamhill County v. Ludwick*, 294 Or 778, 63 P2d 398 (1983) and *Benton County v. Friends of Benton County*, [294 Or 79, 653 P2d 1249 (1982)]." 297 Or at 283 (emphasis added.)

Yamhill County v. Ludwick and *Benton County v. Friends of Benton County* involved a locational *and* causal connection between the developments proposed in the challenged decisions and the effects on the petitioners' nearby properties. The petitioners demonstrated that their properties were located within reasonably close proximity of the proposed developments and that their properties would be negatively impacted by the proposed developments, through increased traffic on a shared road (*Ludwick*) and the increased likelihood of flooding on property two miles downstream from a proposed gravel operation (*Benton County*). In *Jefferson Landfill* the Court also listed examples of "adverse affects" - "noise, odors, increased traffic or potential flooding." Those examples all share a common feature in that they are physical impacts on property that can result from a nearby property owner's use of its property.

Intervenor argues that petitioner has failed to demonstrate that it is "adversely affected" by the decisions because the only impact that petitioner alleges is a negative impact on its *business* that is located approximately 120 miles away from the subject property, through increased competition from intervenor's provision of scrap metal shredding services. According to intervenor, the meaning of the term "adversely affected" does not encompass a negative economic impact on a petitioner's business interests located more than a hundred miles from the subject property. As intervenor argues:

> "It may be that Petitioner believes that 'interests personal to the petitioner' would include a purely economic interest from a competitor located elsewhere in the state. There is no case law that would support such an interpretation or such a tenuous connection for a standing requirement in a land use case. If a competitor in a remote location has standing to appeal a land use decision of another business merely on the basis of thwarting competition, then there is effectively no bar to standing in a land use case and no finality to any land use classification decision." Intervenor-Respondent's Response Brief 2.

In its petition for review, petitioner argues that it is adversely affected by the decisions because "the Shredder negatively impacts Petitioner's business and economic interests and will draw profitability away from existing shredding operations in the state, including Petitioner's existing shredding operations." Petition for Review 4. In its reply brief, petitioner argues that its business is "adversely affected," as that term is described in *Jefferson Landfill*, because the decisions will "* * * detract[] from interests personal to the petitioner," which petitioner explains is its interest in reducing or eliminating competition to its business located in Portland from the shredding business proposed to be located on the subject property in Eugene.

Petitioner cites a LUBA decision that pre-dates *Jefferson Landfill*, *Whitesides Hardware, Inc. v. City of Corvallis*, 9 Or LUBA 24 (1983), in support of its argument that it is adversely affected by the decisions. In *Whitesides*, the petitioner ran a hardware store that was located in the central business district, and appealed a city decision that approved a large shopping center outside of the central business district. LUBA concluded that petitioner had

demonstrated that it would be adversely affected by the decision where it understood the petitioner to allege that the decision approving the shopping center would reduce the quality of the existing central business district area where the petitioner's store was located for "commercial land uses and retail activities [and that injury in turn would] disrupt petitioner's business." *Id*. at 28. In *Whitesides*, the allegation of adverse effect connected the appealed decision to the petitioner's use of its property located within the same city, and to other properties located in the city's central business district. *Whitesides* does not support petitioner's contention that a purely economic impact on a business over 100 miles away can "adversely affect" that business, within the meaning of ORS 197.830(3).

Petitioner also argues that the Oregon Administrative Procedure Act's (APA)'s provision for judicial review of agency orders at ORS 183.480 and ORS 183.484, and cases interpreting that statute, provide context for interpreting ORS 197.830(3) and (5). The original language in LUBA's enabling statute, Oregon Laws 1979, chapter 772, section 4(2) and (3), was similar to and possibly borrowed from the language of the APA in effect at the time, and provided that "a person whose interests are adversely affected or who was aggrieved by the decision" could petition LUBA for review of the decision.[3] The version of the APA in effect in 1979 similarly granted standing to seek judicial review of an agency order to "any person adversely affected or aggrieved." That language remains in the APA today. ORS 183.480(1) and 183.484(1).

Petitioner relies primarily on three APA cases, *PETA v. Inst. Animal Care & Use Comm*., 312 Or 95, 817 P2d 1299 (1991); *Oregon Newspaper Publishers v. Peterson*, 244 Or 116, 415 P2d 21 (1966); and *Marbet v. Portland Gen. Elect*., 277 Or 447, 561 P2d 154 (1977). But those cases are of little or no assistance to petitioner because they all were

[3] In 1989 the legislature enacted the version of ORS 197.830(3) that is in effect in its current form today, and the legislative history of that statutory change demonstrates that the legislature intentionally eliminated the phrase "or aggrieved" from the statute. Minutes, Joint Interim Committee on Land Use, December 5, 1988, 11.

concerned with whether the petitioner was "aggrieved," not with whether the petitioner was "adversely affected." *PETA*, 312 Or at 101-02; *Marbet*, 277 Or at 457; *Oregon Newspaper Publishers*, 244 Or at 121. The issue in this appeal under ORS 197.830(3) is whether petitioner is "adversely affected," not whether it is "aggrieved." Additionally, the Supreme Court has held that the reasoning in land use standing cases is not exportable to APA cases. *See PETA v. Inst. Animal Care & Use Comm*., 312 Or 95, 105, 817 P2d 1299 (1991) ("[l]and use decisions, and the criteria for standing to seek review of these decisions, are sui generis. Trying to generalize rules of standing from them is inappropriate") (*citing Benton County v. Friends of Benton County*, 294 Or at 86-91). It would logically follow that the reverse is also true—cases interpreting the APA term "any person adversely affected or aggrieved" by an order is of limited value in determining the scope of the term "adversely affected" in ORS 197.830(3).

We conclude that petitioner has not satisfied its burden to demonstrate that it is "adversely affected" by the decisions, where petitioner alleges only that the proposed shredding operation on the subject property will affect its "business and economic interests and will draw profitability away from existing shredding operations in the state, including Petitioner's existing shredding operations." Petition for Review 4. The factual circumstances of *Ludwick* and *Benton County*, in which the petitioners demonstrated a locational and causal link between physical effects from the proposed developments and their properties, and the examples of "adverse effects" given by the Court in *Jefferson Landfill* support a conclusion that the phrase "interests personal to the petitioner" used in *Jefferson Landfill* does not include purely economic effects on a business competitor that will suffer no physical effects from the proposed use of the subject property by virtue of the location of its business more than a hundred miles from the subject property.

Our conclusion is consistent with the language in ORS 197.830(3) and (5) allowing a late appeal of an otherwise final land use decision if a person files the notice of intent to

appeal within "21 days of actual notice where notice is required" or "21 days of the date a person knew or should have known of the decision where no notice is required." The reference to "actual notice where notice is required" suggests that the legislature intended that persons who reside within a statutory notice area, usually between 100 and 500 feet from the property, should be allowed to appeal a decision made without a hearing later than 21 days after it is made, presumably because those persons entitled to notice of the decision would be the most likely to be adversely affected by the decision due to their close proximity to the property. Similarly, the requirement that an appeal be brought within 21 days of the date a person who is not entitled to notice "knew or should have known of the decision" suggests that the legislature intended that a late appeal could also be brought by a person who is outside of any required notice area but in close enough proximity to the subject property that they either discover or observe, or should discover or observe it by virtue of the activity occurring, some activity going on *on the property* that could adversely affect them, and that would lead them inquire and discover the land use decision authorizing the activity. *See Abadi v. Washington County*, 35 Or LUBA 67, 72 (1998) (a petitioner who observes construction activity or other indications that a land use decision has been made is thereby placed on inquiry notice, and to preserve the right to appeal under ORS 197.830(3)(b) must thereafter make timely inquiries with the local government to discover the decision.) If the notice, time limits and inquiry obligations were not part of the statute, then any person who learned of a previously issued land use decision with which he disagreed by any means, such as through a years-old Securities and Exchange Commission filing or through a purchase agreement clause, could file a late appeal of a decision. Such a rule would be inconsistent with the legislative policy that "time is of the essence in reaching final decisions in matters involving land use * * *." ORS 197.805.

The appeals are dismissed.[4]

[4] Our dismissal of the appeals without reaching the merits makes it unnecessary to resolve intervenor's motion to strike portions of the amicus brief and the appendices to the brief that contain material that is not part of the records of the appeals, although we would likely grant such a motion if we were required to resolve it.