BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MORTEZA ALEALI,
Petitioner,

vs.

CITY OF SHERWOOD,
Respondent,

and

LANGER GRAMOR, LLC,
Intervenor-Respondent.

LUBA No. 2013-054

FINAL OPINION
AND ORDER

Appeal from City of Sherwood.

Christopher Winters, Portland, represented petitioner.

Christopher D. Crean, Portland, represented respondent.

Seth J. King, Portland, represented intervenor-respondent.

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

DISMISSED 08/22/2013

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 DECISION

Petitioner appeals a decision approving a site plan and conditional use permit for a shopping center.

JURISDICTION

On November 9, 2012, the planning commission issued a land use decision approving, with conditions, a site plan review and conditional use permit for a 190,000-square-foot shopping center. ORS 197.830(9) governs the time for filing appeals of land use decisions and limited 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. * * *"

Respondents move to dismiss the appeal, arguing that petitioner's notice of intent to appeal was not timely filed under ORS 197.830(9).

Petitioner filed his notice of intent to appeal over seven months after the challenged decision became final. However, petitioner argues that the delay in filing is excused by ORS 197.830(3), which provides:

> "If a local government makes a land use decision without providing a hearing[,] * * * 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."

According to petitioner, he lives on and owns property located within 1000 feet of the proposed development, and for that reason he was entitled to notice of the planning

commission hearing under Sherwood Zoning and Development Code (SZDC) 16.72.020.C.1.[1] Petitioner's Response 1.

Petitioner asserts that he and 33 other persons who own land within the 1000-foot notice area did not receive notice of the planning commission hearing to which he and they were entitled under SZDC 16.72.020.C.1. Respondents respond with an affidavit from a city planner that respondents maintain demonstrates that the city sent notice of the hearing to petitioner as required by SZDC 16.72.020.C.1.[2] Intervenor's Reply 2 and Exhibit A. We understand petitioner to dispute that the affidavit is adequate to establish that the city sent the notice to petitioner that SZDC 16.72.020.C.1 required the city to send. Given our disposition of this appeal, we will assume without deciding that the city did not send the notice required by SZDC 16.72.020.C.1 to petitioner.

ORS 197.763(8) provides in part that "[t]he failure of the property owner to receive notice as provided in this section shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice was given. * * *" Intervenor argues the city's affidavit is conclusive, under ORS 197.763(8), to establish that the city gave the notice required under SZDC 16.72.020.C.1. But there are two problems with intervenor's

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[1] SZDC 16.72.020.C.1 provides in relevant part:

> "For Type II, III, IV and V actions specific to a property or group of properties, the City shall send written notice by regular mail to owners of record of all real property within one thousand (1,000) feet from the property subject to the land use action."

[2] SZDC 16.72.020.D.1 provides in relevant part:

> "The failure of a property owner or other party to an application to receive notice of a public hearing as provided in Code of this Chapter or to receive notice of continuances and appeals as provided by this Code due to circumstances beyond the control of the City, including but not limited to recent changes in ownership not reflected in County Assessors records, loss of the notice by the postal service, or an inaccurate address provided by the County Assessor or the party to the application, shall not invalidate the applicable public hearing or land use action. The City shall prepare and maintain affidavits demonstrating that public notices were mailed, published, and posted pursuant to this Code."

argument. First, ORS 197.763(8) addresses "notice as provided in this section," presumably referring to the notice required under ORS 197.763(2) and (3), and does not apply to notices provided as required by local ordinances. Second, ORS 197.763(8) simply says a property owner's failure to receive notice will not "invalidate [the city's] proceedings" if the city can produce an affidavit that notice was given. ORS 197.763(8) does not say the city's affidavit is sufficient to establish that the city in fact sent the required notice, where, as here, petitioner disputes that the city actually sent the required notice.

Petitioner cites *Leonard v. Union County*, 24 Or LUBA 362 (1992), to support his assertion that the time for filing an appeal of the challenged decision was tolled pursuant to ORS 197.830(3), because the city's alleged failure to send petitioner the notice of the hearing required by SZDC 16.72.020.C.1 amounted to failure to provide a hearing to petitioner. *Leonard* was an appeal of an ordinance that amended the county's comprehensive plan, zoning and development ordinance, and plan and zoning map. In *Leonard*, we held that, under ORS 197.830(3), the county "fail[ed] to provide a hearing" where it failed to provide a person with the individual notice of the hearing that he or she was entitled to receive under state or local law. *Id.* at 374-75.

However, *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995), partially overruled our holding in *Leonard*. In *Orenco* the Court of Appeals held that a local government's failure to provide a prehearing notice that is required by local law, but not required by state law, does not have the effect of tolling, pursuant to ORS 197.830(3), the statutory deadline established by ORS 197.830(9) for appealing a post-acknowledgement plan amendment (PAPA).[3] The decision challenged in *Orenco* was a legislative PAPA that amended the city's zoning ordinance. Appeals of PAPAs are governed by the second

[3] We assume without deciding 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. *See Murray v. Multnomah County*, 56 Or LUBA 370, 377 (2008) (so assuming).

sentence of ORS 197.830(9), which provides that "[a] notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to ORS 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615."

The Court held that the city's alleged noncompliance with a local prehearing notice requirement did not operate under ORS 197.830(3) to toll the statutory 21-day period for appeals of PAPAs now codified at 197.830(9). The Court explained:

> "* * * ORS 197.610 to ORS 197.625 comprehensively govern the procedures applicable to post-acknowledgment amendments and additions to local land use legislation. The appeal period defined in ORS 197.830(8) [now 197.830(9)] is an integral part of those procedures. Under ORS 197.625(1), the new or amended local legislation 'shall be considered acknowledged' if, *inter alia*, 'no notice of intent to appeal is filed within the 21–day period set out in ORS 197.830(8).' Conversely, if an appeal is taken within that time, the amendment or new legislation is not deemed acknowledged until the time that a LUBA or judicial decision affirming it becomes final. ORS 197.625(1), (2).
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> "Under petitioners' reading, ORS 197.830(3) makes it possible for a local notice provision, which has no analog in state statutes, either to alter the time at which an unappealed amendment is deemed acknowledged under those statutes or to extend the period for appealing such an amendment beyond the time that it has been deemed acknowledged under the statutes. Either of those effects would distort the roles that the post-acknowledgment statutes assign to the appeal process and to the finality of acknowledgments. In the light of their text and context, it is not plausible to interpret ORS 197.830(3) and (8)—as petitioners do—as allowing the fundamental operation of the statutory post-acknowledgment process to be a variable of, or a hostage to, locally adopted procedures."

The holding in *Orenco* did not reach the circumstances presented here, failure to give notice of hearing prior to approval of a land use decision that is not a PAPA.[4] However,

[4] In *Orenco*, the city of Hillsboro argued that *Leonard* was wrongly decided and that none of the time periods set out in ORS 197.830(9) for appeals of land use decisions, limited land use decisions, or PAPAs can be tolled pursuant to ORS 197.830(3) merely because a local government failed to give notice required only by a local code provision. The Court limited its holding to the decision that was before it in that appeal, a PAPA, and did not address the city's argument that *Leonard* was wrongly decided and that a failure of locally required notice of hearing could never toll pursuant to ORS 197.830(3) the ORS 197.830(9) deadlines. *Id.* at 431.

based on reasons that are similar to those expressed by the Court in *Orenco*, we do not believe the city's failure to give a notice that was only required by local law operates under ORS 197.830(3) to toll the statutory deadline for filing a notice of intent to appeal under the first sentence of ORS 197.830(9).

Both the PAPA challenged in *Orenco* and the land use decision approving site plan review and a conditional use permit challenged in the present appeal are subject to a legislatively adopted 21-day deadline for filing a notice of intent to appeal. ORS 197.830(9). ORS 197.805 provides that "[i]t is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives." That legislative policy is a sufficient basis for concluding that a city's failure to provide a notice of hearing that is required only by law will not operate under ORS 197.830(3) to toll the period set out in the first sentence of ORS 197.830(9). To the extent our decision in *Leonard* holds to the contrary, it is overruled. *See Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 224, 939 P2d 625 (1997) (overturning the *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986) tolling doctrine as inconsistent with the deadline to appeal to LUBA set out in the first sentence of what is now codified at ORS 197.830(9)); *see also Plaid Pantries v. City of Tigard*, 60 Or LUBA 441 (2010) (where a petitioner is only entitled to notice of a hearing on a planned development application under local provisions, and is not entitled to such notice under state statutes, under *Orenco*, any failure to provide notice of a hearing does not toll the 21-day appeal deadline under ORS 197.830(9), pursuant to ORS 197.830(3)). Just as the Court concluded that a failure to comply with local law notice requirements may not operate to defeat finality under the statutory scheme for maintaining acknowledged comprehensive plans and land use regulations in *Orenco*, we believe the Court would similarly conclude a local government's failure to comply with local

law notice requirements does not operate under ORS 197.830(3) to toll the statutory deadline that is set out in the first sentence of ORS 197.830(9) for filing an appeal with LUBA. Even though the importance of the finality of the acknowledgement of PAPAs that the Court emphasized in *Orenco* is not an issue in the present appeal, the possibility of late appeals based on the failure to satisfy local hearing notice requirements similarly undercuts the statutory preference for and emphasis on the importance of the finality of land use decisions and limited land use decisions.

The property that is the subject of the challenged decision "is wholly * * * within an urban growth boundary," and the applicable statutory notice requirements are contained in ORS 197.763(2)(a). Under ORS 197.763(2)(a), notice of hearing shall be provided to owners of property that is located "*[w]ithin 100 feet* of the property which is the subject of the notice." (Emphasis added.) Petitioner does not claim that he owns property within 100 feet of the property that was the subject of the notice of hearing, or that the city failed to provide petitioner with notice he was entitled to receive under state law. Therefore, petitioner is not entitled to rely on ORS 197.830(3), and his notice of intent to appeal was not timely filed.

Respondents' motions to dismiss are granted.

The appeal is dismissed.