

NATURE OF THE DECISION

In LUBA No. 2013-079, petitioners appeal a March 19, 2013 decision approving an adjustment to a required side yard setback for a proposed garage. In LUBA No. 2013-083, petitioners appeal a building permit issued June 19, 2013 for the garage.¹

FACTS

The subject property is a “through lot” with frontage on both S.W. Talbot Road and S.W. Summit Drive, in Portland. The property contains a dwelling. On February 25, 2013, the city’s planning department provided notice to petitioners of an application for an adjustment to the side yard setback for a proposed new garage to be located in the southwest corner of the lot. The proposed adjustment reduces the side yard setback from the required five feet to 18 inches. On March 19, 2013, the city’s planning department approved the adjustment, and on March 22, 2013, the city mailed notice of its decision approving the adjustment application to petitioners and others.² Record 126. No hearing was held on the adjustment application. The notice included a notice of a right to appeal the city’s decision to the city’s adjustment committee. Record 127. On June 19, 2013 the city issued a building permit to allow construction of the garage that is the subject of the adjustment. Almost two months later, on August 9, 2013, the city approved a revised building permit for the garage.

All three decisions were appealed to LUBA. Two of those appeals were filed on August 30, 2013. The first appeal (LUBA No. 2013-078) seeks review of the August 9, 2013 revised building permit decision. The second appeal (LUBA No. 2013-079) seeks review of the March 19, 2013 adjustment decision. Petitioners’ third appeal (LUBA No. 2013-083)

¹ By separate order issued this date, we bifurcate LUBA No. 2013-078 from LUBA Nos. 2013-079 and 2013-083.

² The applicant originally requested reduction of the setback to one foot but the city approved a reduction to 18 inches. Record 125-26.

1 was filed on September 5, 2013. In that appeal, petitioners seek review of the original June
2 19, 2013 building permit.

3 **JURISDICTION**

4 The City of Portland (city) moves to dismiss LUBA No. 2013-079 (the March 19,
5 2013 adjustment decision) and LUBA No. 2013-083 (the June 19, 2013 original building
6 permit), asserting that the notices of intent to appeal were untimely filed. The city does not
7 move to dismiss LUBA No. 2013-078 (the August 9, 2013 revised building permit decision).

8 **A. LUBA No. 2013-079 (March 19, 2013 Adjustment Decision)**

9 ORS 197.830(9) generally requires that a notice of intent to appeal a land use decision
10 to LUBA be filed no later than 21 days after the date the decision becomes final. However,
11 ORS 197.830(3) and ORS 197.830(4) provide alternative appeal deadlines in the
12 circumstances specified in those provisions. ORS 197.830(3) provides:

13 “If a local government makes a land use decision without providing a hearing,
14 *except as provided under ORS 215.416(11) or 227.175(10)*, or the local
15 government makes a land use decision that is different from the proposal
16 described in the notice of hearing to such a degree that the notice of the
17 proposed action did not reasonably describe the local government’s final
18 actions, a person adversely affected by the decision may appeal the decision to
19 [LUBA] under this section:

20 “(a) Within 21 days of actual notice where notice is required; or

21 “(b) Within 21 days of the date a person knew or should have known of the
22 decision where no notice is required.” (Emphasis added.)

23 Thus, ORS 197.830(3) provides an alternative deadline for appealing a land use decision
24 where either (1) a local government makes a land use decision without providing a hearing,
25 or (2) a local government makes a land use decision after providing a hearing, but the local
26 government’s final decision is significantly different from the proposed action described in

1 the notice of the hearing.³ Importantly, for purposes of resolving the motion to dismiss, we
2 emphasize that number (1) above does not apply to statutory permit decisions that are
3 rendered without a hearing under ORS 227.175(10) (applicable to cities) or 215.416(11)
4 (applicable to counties); and number (2) above only applies where there is defective “notice
5 of hearing,” and therefore only applies where the decision was rendered after a hearing.

6 ORS 197.830(4) provides alternative appeal deadlines where the local government
7 makes a decision on an application for a “permit” without a hearing pursuant to ORS
8 227.175(10):

9 “If a local government makes a land use decision without a hearing pursuant
10 to ORS 215.416(11) or 227.175(10):

11 “(a) A person who was not provided notice of the decision as required
12 under ORS 215.416(11)(c) or 227.175(10)(c) may appeal the decision
13 to the board under this section within 21 days of receiving actual
14 notice of the decision.

15 “(b) A person who is not entitled to notice under ORS 215.416(11)(c) or
16 227.175(10)(c) but who is adversely affected or aggrieved by the
17 decision may appeal the decision to the board under this section within
18 21 days after the expiration of the period for filing a local appeal of the
19 decision established by the local government under ORS
20 215.416(11)(a) or 227.175(10)(a).

21 “(c) A person who receives mailed notice of a decision made without a
22 hearing under ORS 215.416(11) or 227.175(10) may appeal the
23 decision to the board under this section within 21 days of receiving
24 actual notice of the nature of the decision, *if the mailed notice of the*
25 *decision did not reasonably describe the nature of the decision.*”
26 (Emphasis added.)

27 Initially, we note that petitioners focus their jurisdictional arguments on ORS 197.830(3),
28 which, as noted, allows late appeals of decisions made without a hearing “except as provided
29 under * * * ORS 227.175(10),” the permit statute applicable to cities. The challenged

³ ORS 227.160(2) defines “permit” in relevant part to mean “[the] discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation.”

1 adjustment decision is a decision made without a hearing and appears to be a decision on an
2 application for a “permit” as defined in ORS 227.160(2).⁴ However, we assume for purposes
3 of this opinion that ORS 197.830(3) and ORS 197.830(4)(c) require the same basic inquiry in
4 order to determine whether petitioners’ appeal of the city’s adjustment decision is timely
5 filed: whether the city’s notice of the proposal and resulting decision contain accurate
6 descriptions of the proposal and the decision.

7 Petitioners were entitled to and in fact did receive notice of the city’s decision.
8 Record 131. For the reasons set forth below, we agree with the city that petitioners’ appeal of
9 the city’s decision approving an adjustment to the side yard setback is not timely filed.

10 ORS 197.830(4)(c) requires petitioners to demonstrate, as relevant, that the mailed
11 “notice of the decision did not reasonably describe the nature of the decision[.]” The mailed
12 notice of the decision explains the decision as follows:

13
14 “The applicant proposes to add a detached, single-car [346.5 square feet]
15 garage to the site. The applicant is eligible for the front setback averaging
16 regulation at 33.110.120, and is therefore proposing a 3 foot 9 inch front
17 setback, the average of the two garage setbacks on abutting properties. This
18 setback is allowed by right. The applicant also proposes to locate the new
19 garage 1 foot from the south [side] property line. Garages in the R5 zone
20 are allowed to be at a 0 foot side and rear setback, if they meet certain
21 requirements [size, height, and distance from the front property line];
22 however, because the lot is a through lot, the garage does not meet the
23 distance requirement from the front property line to allow the garage to not
24 meet the required 5 foot setback. Therefore, the proposed garage is subject
25 to the required 5 foot side setback for structures in the R5 zone[, which] is 5

⁴ The procedure the city employed to process the adjustment application appears to comport with the requirements of ORS 227.175(10). The decision states that the city’s decision is subject to the “120-day rule” applicable to an application for a “permit” in ORS 227.178:

“ORS 227.178 states that the City must issue a final decision on Land Use Review applications within 120-days of the application being deemed complete. * * *” Record 126.

The decision also explains that the decision may be appealed to the city’s Adjustment Committee, which will hold an appeal hearing, and contains language that generally mirrors ORS 227.175(10)(a)(C), the procedure that applies to appeals of decisions on permits that are made without a hearing. Record 126-27. Finally, an adjustment is in essence a variance to a code requirement, and the criteria governing an adjustment at PCC 33.805.040 appear to involve the discretionary approval of the proposed development of land.

1 feet. The applicant requests an Adjustment to reduce the side setback from
2 5 feet to 1 foot. Attached to this Decision is a zoning map and plans
3 depicting the proposal.” Record 125.

4 The mailed notice of the proposal that preceded the mailed notice of the decision is identical
5 in all respects to the mailed notice of the decision except that the last sentence uses the word
6 “proposal” instead of the word “decision.” Record 147-48.

7 Petitioners attempt to characterize the challenged adjustment decision approving a
8 three and one-half foot reduction to the required side yard setback as one part of a larger,
9 somewhat contemporaneous proposal that contemplates adding a third story to the existing
10 two story house, and adds a new walkway to the proposed garage from the new third story.
11 Record 1. Petitioners argue that the site plan attached to the notices of the adjustment
12 proposal and the adjustment decision fails to show the proposed renovations or the proposed
13 new walkway between the proposed garage and the existing dwelling. We understand
14 petitioners to argue that because the notices and the site plan did not describe or show any
15 proposed renovations to the dwelling or the new walkway from the garage to the new third
16 story, the notices did not reasonably describe the nature of the decision.

17 Petitioners cite *Bigley v. City of Portland*, 168 Or App 508, 513-15, 4 P3d 741 (2000)
18 in support of their argument. In *Bigley*, the city’s notice of the hearing described its proposed
19 action as adopting amendments to the Metro Washington Park Zoo Master Plan that included
20 building a temporary parking lot. The city’s decision ultimately approved a permanent
21 parking lot rather than a temporary one. The Court of Appeals concluded that the city’s
22 notice of proposed action included in its notice of hearing failed to reasonably describe the
23 final action, and that petitioners’ appeal was timely filed under ORS 197.830(3). *Id.* at 513-
24 15.

25 To the extent *Bigley* is apposite in applying ORS 197.830(4)(c), *Bigley* does not assist
26 petitioners. In *Bigley* the city’s final decision turned out to be materially different than the
27 proposed action in that the parking lot was represented as temporary in the notice of hearing,

1 and the city’s final action ultimately authorized a permanent parking lot.

2 In contrast in the present appeal, although the proposed new walkway from the garage
3 to the new third story of the house shown at Record 1 makes this a slightly closer case, the
4 proposed walkway is not located within the adjusted setback, or even on the same side of the
5 garage as the adjusted setback. The notice of the proposal and the notice of decision both
6 accurately describe the adjustment as an adjustment for a detached garage with a reduced
7 side-yard setback, and the only thing the city’s adjustment decision ultimately approved is the
8 adjustment to the side yard setback. Moreover, in *Lee v. City of Portland*, 40 Or LUBA 498,
9 502-03 (2001), we rejected a similar attempt to characterize “the proposed action” for
10 purposes of an adjustment application as including other areas or aspects of development of
11 property that were unrelated to the requested adjustment. We said instead that the scope of
12 review of a decision approving an adjustment is limited to the adjustment itself. *Id.*

13 The city’s notices of the proposal and the decision describe an adjustment for a
14 reduced side yard setback for a new garage, and the city’s final decision approved exactly
15 that, and nothing more. Accordingly, petitioners have not demonstrated that ORS
16 197.830(4)(c) allows their appeal to be filed outside of the 21-day appeal period set out in
17 ORS 197.830(9).

18 LUBA No. 2013-079 is dismissed.

19 **B. LUBA No. 2013-083 (June 19, 2013 building permit)**

20 In LUBA No. 2013-083, petitioners appeal a building permit issued on June 19, 2013
21 for construction of the garage. The city asserts that the notice of intent to appeal the building
22 permit was untimely filed and moves to dismiss the appeal. ORS 197.830(3)(b) provides the
23 relevant appeal deadline, and requires petitioners to appeal the decision to LUBA “[w]ithin
24 21 days of the date [petitioners] knew or should have known of the decision * * *.”

25 The city argues that petitioners “knew” about the building permit decision for
26 purposes of ORS 197.830(3)(b) on July 26, 2013, and were required to file their appeal not

1 later than 21 days after that date. The city points to a July 26, 2013 email from petitioners to
2 the city that refers to an application for a building permit for the home renovations and “the
3 earlier building permit at this address and the variance obtained for its issuance.”
4 Supplemental Record 10.

5 The city also argues that petitioners “should have known” of the June 19, 2013
6 building permit decision for purposes of ORS 197.830(3)(b) at the end of the second week of
7 July, 2013.⁵ The city argues that petitioners were placed on inquiry notice that a land use
8 decision had been rendered because (1) petitioners had previously received notice of the
9 March 19, 2013 decision approving an adjustment for the garage, and (2) construction
10 activity related to the garage occurred during the first two weeks of July. The city supports
11 its argument that the construction activity should have placed petitioners on inquiry notice
12 that a building permit had been issued for the garage with a statement from the applicant that
13 during the first two weeks of July, because the applicant installed silt control fencing and
14 poured concrete footings for the garage.

15 Petitioners do not respond to the city’s argument that they “knew” of the building
16 permit decision not later than July 26, 2013, or otherwise provide any explanation for their
17 July 26, 2013 email to the city that is found at Supplemental Record 10 and that specifically
18 references “the earlier building permit at this address and the variance obtained for its
19 issuance.” Petitioners respond that the construction activity that occurred on the property in
20 early July did not place them on inquiry notice that a building permit for the garage had been
21 rendered because, according to petitioners, the excavation was outside of the area in which
22 the garage is to be located and the concrete “appeared to be patio and terrace construction.”

⁵ Under ORS 197.830(3)(b), where a petitioner does not have knowledge of a land use decision but observes activity or otherwise obtains information reasonably suggesting that a land use decision has been rendered, that petitioner is placed on notice to make inquiries regarding the nature of the land use decision. The 21-day appeal deadline begins to run on the date that timely inquiries are made and the decision is discovered or, in the absence of timely inquiries, on the date the petitioner is placed on inquiry notice. *Rogers v. City of Eagle Point*, 42 Or LUBA 607, (2002).

1 Petitioners' Response 13. Petitioners argue that an August 6, 2013 meeting with the city's
2 bureau of development services planners put petitioners on inquiry notice, and petitioners
3 discovered that the building permit for the garage had been issued on August 16, 2013 "when
4 their neighbor told them about it * * *" and timely filed their appeal 21 days later.
5 Petitioners' Response 13.

6 We agree with the city that petitioners "knew" of the building permit for the garage by
7 July 26, 2013, as evidenced by the email at Supplemental Record 10. Petitioners were
8 required to appeal the decision within 21 days of that date. Having failed to do so,
9 petitioners' appeal of the June 19, 2013 building permit decision is untimely filed.

10 LUBA No. 2013-083 is dismissed.