BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELLE BELLE BEND, LLC,
Petitioner,

vs.

CITY OF BEND,
Respondent.

LUBA No. 2013-115

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Ken Brinich, Bend, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hendrix, Brinich, & Bertalan, LLP.

Mary Winters, City Attorney, Bend, and Gary Firestone, City Attorney, Bend, filed the response brief and Gary Firestone argued on behalf of respondent.

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

REMANDED 03/06/2014

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 by the city denying its appeal of a decision by the planning director, which approves a site plan and conditional use permit for an accessory dwelling unit on land located in the city.

FACTS

On November 7, 2013, the city's planning director approved an application for site plan review and a conditional use permit for an accessory dwelling unit (ADU) on land zoned Low Density Residential. The city processed the application according to its procedures for "Type II" applications set out in Bend Development Code (BDC) 4.1.415. Pursuant to BDC 4.1.420.A, prior to issuing the decision, the city sent notices of the application to the Southwest Bend Neighborhood Association and to property owners within 250 feet of the property that is the subject of the application (the ADU property). Record 25-26.

Petitioner owns and operates a manufactured home park that is located approximately 900 feet from the boundary of the ADU property. Because petitioner's property is beyond the 250-foot notice area, petitioner was not sent and petitioner did not receive written notice of the application or the decision. Petitioner nevertheless filed a timely appeal of the planning director's decision on November 19, 2013. On November 22, 2013, the city issued a written decision entitled "Notice of Invalid Filing" that concluded that petitioner's appeal of the November 7, 2013 planning director decision was invalid, for reasons we explain in more detail below. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In order to frame the single issue in this appeal we first set out the provisions of the BDC that apply to appeals. We then set out the relevant statutory requirements for a decision on a "permit" as defined in ORS 227.160(2).[1]

BDC 4.1.1110 provides:

"**Who May Appeal**.

"A. The following may file an appeal:

"1. A party; or

"2. A person entitled to notice and to whom no notice was mailed.

"B. A person to whom notice is mailed is deemed notified even if notice is not received."

"Party" is defined in BDC 1.2 to mean

> "[O]ne who takes part or participates in a Type II, III, or IV application or a legislative action. A party includes any person who has standing. A person can become a party by appearing on the record at a hearing (including appeals) or presenting written evidence in conjunction with an administrative action or hearing, or by being a property owner whose property would be burdened by a solar access permit. The City may designate a representative for persons whose participation consists only of signing a petition."

Although no notice was mailed to petitioner, petitioner was not entitled to notice under BDC 4.1.420.A. Thus, under BDC 4.1.1110.A.1, petitioner is

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[1] ORS 227.160(2) defines "permit" to mean "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation."

entitled to appeal the planning director's decision only if it is a "party" as defined in BDC 1.2. In order to qualify as a "party" under BDC 1.2, petitioner must "take part or participate[] in" the "Type II * * * application," either by (1) appearing on the record at a hearing (in this case no hearing was held); or (2) "presenting written evidence in conjunction with an administrative action * * * [.]"

In the challenged decision, the city concluded that petitioner is not a "party" under BDC 1.2 because it did not "present written evidence in conjunction with" the application. Record 2. As far as we can tell, the city correctly concluded that petitioner is not entitled to file a local appeal under BDC 4.1.1110.

However, there is no dispute that the city's decision approves a "permit" as defined at ORS 227.160(2), *i.e.*, the discretionary approval of the proposed development of land under city planning legislation. ORS 227.175(3) requires the city to hold at least one public hearing on an application for a permit, unless the city processes the permit application according to the statutory procedures for a city decision on an application for an ORS 227.160(2) permit that is made without a prior hearing. Those procedures are set out and described in detail at ORS 227.175(10)(a) through (c), relevant portions of which we set out below:

> "(a)(A)The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing *if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved*, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.[2]

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[2] ORS 227.175(10)(c) provides:

"(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.

"(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, *the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the city's land use regulations*. A city may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the

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"(c)(A)Notice of a decision under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located:

"(i) Within 100 feet of the property that is the subject of the notice when the subject property is wholly or in part within an urban growth boundary;

"(ii) Within 250 feet of the property that is the subject of the notice when the subject property is outside an urban growth boundary and not within a farm or forest zone; or

"(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.

"(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site."

decision directly to the Land Use Board of Appeals under ORS 197.830.

"(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

"(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. * * *" (Emphases added.)

In its first assignment of error, petitioner argues that the city erred in rejecting its timely appeal of the planning director's decision. According to petitioner, BDC 4.1.1110.A.1's limit on the right to appeal a permit decision made without a hearing to a "party" as defined in BDC 1.2 is inconsistent with ORS 227.175(10)(a). That is so, petitioner argues, because ORS 227.175(10)(a)(A) and (C) provide broader appeal rights, by allowing a person who is "adversely affected or aggrieved" to file an appeal of a decision on a permit made without a hearing.[3] According to petitioner, BDC 1.2 and BDC 4.1.1110.A.1 are inconsistent with the statute because together they limit the right of appeal of a permit decision made without a hearing to persons who "presented written evidence in conjunction with an administrative decision * * *."

[3] Although not relevant in this appeal, ORS 227.175(10)(a)(A) also gives appeal rights to "persons entitled to notice" under ORS 227.175(10)(c), while BDC 4.1.1110.A.2 gives appeal rights only to persons who were not mailed the notice to which they were entitled under the BDC.

We agree with petitioner that the city erred in rejecting its appeal of the permit decision made without a hearing because petitioner did not "present written evidence in conjunction with" the application as required by BDC 4.1.1110.A.1 and BDC 1.2. As relevant here, the statute allows a "person who is adversely affected or aggrieved" to appeal a decision made without a hearing. If a person can demonstrate that he or she is "adversely affected or aggrieved" by a decision on a permit made without a hearing, then that person is entitled to appeal the decision. There is nothing in the statute that limits persons who are "adversely affected or aggrieved" to persons who submitted written comments to the city prior to the permit decision being issued. BDC 4.1.1110A.1's limit on appeal rights to a "party" and the BDC 1.2 definition of "party" as including only those who submitted written comments prior to the administrative decision being made are inconsistent with ORS 227.175(10)(a)(A) and (C).[4]

ORS 227.175(3) requires the city to hold a public hearing that is conducted in conformance with the provisions of ORS 197.763 prior to a decision on an application for a permit. ORS 227.175(10) allows the city to make a decision on a permit without first holding the public hearing that is otherwise required by ORS 227.175(3). But there is a *quid pro quo* where the

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[4] The city responds that BDC 4.1.1100 is a provision that has been acknowledged to comply with the statewide planning goals. Response Brief 4. However, acknowledgement of compliance with the statewide planning goals does not mean that a local code provision has been determined by LCDC to be consistent with relevant statutes. Neither does it eliminate the city's obligation to comply with relevant statutes. *See Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076 (1992) (even after acknowledgment, where an acknowledged comprehensive plan or land use regulation is inconsistent with a statutory obligation, the statutory obligation must be observed).

city chooses to dispense with the ORS 227.175(3) prior public hearing: the statute gives rights to persons who are "adversely affected or aggrieved" by the decision made without a public hearing to request that the city conduct the de novo evidentiary hearing that, but for ORS 227.175(10)(a), the city was required to provide before approving a permit.

Petitioner's appeal statement took the position that it was both "adversely affected" and "aggrieved" within the meaning of ORS 227.175(10)(a). Record 7-8. On remand, the city must apply ORS 227.175(10)(a) to petitioner's appeal.

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

The challenged decision is the city's decision denying petitioner's local appeal of the planning director's decision approving the conditional use permit and site plan for an ADU. In its second and third assignments of error, petitioner directly challenges the merits of the planning director's decision to approve the ADU.[5]

We remand the decision for the city to apply ORS 227.175(10)(a) to petitioner's appeal. If the city determines that ORS 227.175(10)(a) entitles petitioner to a de novo evidentiary hearing, then it will hold a de novo hearing to consider petitioner's challenges to the planning director's decision, and ultimately issue a new decision approving or denying the site review and conditional use application. If the city determines that petitioner is not entitled to a de novo evidentiary hearing, then the city will not reach the merits of

[5] Petitioner argues that the application fails to satisfy architectural design review standards and fails to comply with the International Residential Code.

petitioner's challenges to the planning director's underlying decision, but instead deny the appeal. Due to the exhaustion requirement of ORS 197.825(2)(a), petitioner's only recourse in that event will be to appeal to LUBA the city's denial of its appeal. In either event, LUBA does not and will not have jurisdiction over the November 7, 2013 planning director's decision, or review authority over any challenges petitioner makes to that decision. Accordingly, the second and third assignments of error provide no basis for reversal or remand of the city's November 22, 2013 decision denying petitioner's appeal, and these assignments of error are denied.

The city's decision is remanded.