BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES PHILLIPS,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent.

LUBA No. 2014-082

FINAL OPINION
AND ORDER

Appeal from City of Happy Valley.

James Phillips, Clackamas, represented himself.

Christopher D. Crean, Portland, represented respondent.

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

DISMISSED 01/06/2015

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that annexes and rezones ten properties.[1]

FACTS

On March 13, 2009, the city sent individual written notice to a large number of persons that the city would hold a public hearing on April 21, 2009, to consider whether to annex and apply city comprehensive planning and zoning map designations for ten properties in place of county designations. The notice identified the properties by tax map number and showed their locations on maps. The notice identified the existing county zoning and the proposed city zoning for each property. The city sent a copy of that notice to petitioner, and petitioner does not claim that he did not receive that notice.

At the conclusion of that April 21, 2009 hearing, the city adopted Ordinance 387, which annexed and rezoned the ten properties identified in the notice of hearing. Over five years later, on September 13, 2014, petitioner filed with LUBA a notice of intent to appeal Ordinance 387.

MOTION TO DISMISS

The general deadline for filing a notice of intent to appeal is set out at ORS 197.830(9).[2] The city argues that under ORS 197.830(9), the deadline for

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[1] Although the ordinance states that the plan map designations are to be changed as well, it does not appear the ordinance changed the plan map designations. That may be because the city and county have adopted the same plan designations for the annexed properties. The parties do not argue this ambiguity is important and we do not consider it further.

[2] ORS 197.830(9) provides:

petitioner to file the notice of intent to appeal in this matter was, as set out in the first sentence of ORS 197.830(9), "21 days after the date the decision sought to be reviewed becomes final." Since the disputed ordinance adopted new planning and zoning map designations for the properties, the ordinance almost certainly qualifies as an ordinance that adopted "plan and land use regulation amendments" to the city's comprehensive plan and land use regulations that was, or should have been, "processed pursuant to ORS 197.610 to 197.625." Under the second sentence of ORS 197.830(9), the deadline for filing a LUBA appeal of such a decision is "not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615." However, neither party argues

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> "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. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a statement identifying when, how and to whom notice was provided under ORS 197.615 does not render the notice defective. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $200 and a deposit for costs to be established by the board. If a petition for review is not filed with the board as required in subsections (10) and (11) of this section, the filing fee and deposit shall be awarded to the local government, special district or state agency as cost of preparation of the record."

that the second sentence of ORS 197.830(9) applies or that the appeal was filed within "21 days after notice of the decision sought to be reviewed [was] mailed or otherwise submitted to parties entitled to notice under ORS 197.615." To summarize, petitioner does not claim his notice of intent to appeal was timely filed under ORS 197.830(9). Rather, petitioner's entire argument is that the deadline for filing his notice of intent to appeal is governed by ORS 197.830(3), not ORS 197.830(9).

ORS 197.830(3) extends the deadline for filing a notice of intent to appeal in two circumstances.[3] The deadline for filing a notice of intent to appeal is delayed until actual notice or constructive notice of the decision under ORS 197.830(3) where: (1) the local government renders a "land use decision without providing a hearing[,]" or (2) the local government holds a hearing but the final action taken after that hearing is sufficiently at odds with the proposal described in the notice that the notice "does not reasonably describe the local government's final action."

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[3] As relevant, ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, * * * or the local government makes a land use 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:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

After the city filed its motion to dismiss on September 24, 2014, petitioner filed a response on October 4, 2014, and filed an addendum to that response on October 7, 2014. The city filed a Reply on October 9, 2014. Petitioner then filed a 12-page Reply on October 11, 2014.

Petitioner's reasoning for why his appeal was timely filed under ORS 197.830(3) has evolved somewhat. Petitioner's primary legal theory from the beginning has been that the city was required to follow quasi-judicial procedures in adopting the disputed ordinance. Petitioner contends the written notice the city gave him prior to adopting the challenged ordinance did not comply with some of the requirements of ORS 197.763(3), which sets out the required content of notices for quasi-judicial land use hearings.[4] As a result of

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[4] ORS 197.763(3) provides:

"The notice provided by the jurisdiction shall:

"(a) Explain the nature of the application and the proposed use or uses which could be authorized;

"(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

"(c) Set forth the street address or other easily understood geographical reference to the subject property;

"(d) State the date, time and location of the hearing;

"(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

"(f) Be mailed at least:

these notice defects, petitioner argues, the city adopted the ordinance "without providing a hearing," within the meaning of ORS 197.830(3).[5]

The city responds that the challenged ordinance is legislative, rather than quasi-judicial, so that ORS 197.763(3) does not apply. The city also argues that even if ORS 197.763(3) applies, the city's notice complied with the statute.

We need not resolve the parties' contentions regarding whether ORS 197.763(3) applies in this case or whether the notice of hearing complies with

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> "(A) Twenty days before the evidentiary hearing; or
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> "(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;
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> "(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;
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> "(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;
>
> "(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and
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> "(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings."

[5] Among other things, petitioner contends the notice did not identify "the proposed land use or uses that could be authorized" and therefore does not comply with ORS 197.763(3)(a) and the equivalent of that notice requirement in the Happy Valley Development Ordinance (HVDO) 16.61.040(D)(3)(a).

ORS 197.763(3), because in either event petitioner simply misreads ORS 197.830(3). *See* n 3.

There is no dispute that the city provided written prehearing notice of its April 21, 2009 hearing in this matter to petitioner. More importantly, there is also no dispute that the city in fact held a public hearing on the proposed annexation and rezoning on April 21, 2009. Because the city in fact provided prior written notice of that hearing to petitioner and held the hearing, the part of ORS 197.830(3) that delays the deadline for filing a notice of intent to appeal in cases where the decision was rendered "without providing a hearing" simply does not apply.

Therefore, the only portion of ORS 197.830(3) that potentially applies in this case to delay the deadline for filing the notice of intent to appeal to the date petitioner received actual or constructive notice of the decision is the language that delays the filing deadline where "the local government makes a land use 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." *See* n 3. The first time petitioner arguably attempts to rely on that language in ORS 197.830(3) is near the end of his final October 11, 2014 Reply.

The city's notice of hearing identified the 10 properties that were to be annexed and rezoned. The notice identified the existing county zoning of the 10 properties and identified the city zoning that was to be applied. After the hearing was held on April 21, 2009, the city council adopted the ordinance that annexed the same properties that were identified in the notice of hearing and applied the same city zoning that was identified in the notice of hearing. In other words, there was *no difference* in the proposed action identified in the

notice of hearing and the action taken by the challenged ordinance.[6] *Compare Bigley v. City of Portland*, 168 Or App 508, 514, 4 P3d 741 (2000) (ORS 197.830(3) applies where decision converts temporary parking lot to permanent parking lot and notice of hearing does not mention that action). Nevertheless, petitioner argues:

> "[T]he notice that was provided was defective to such a point that no notice mailed satisfied the notice requirements. [I]t is obvious that the notice failed to describe the true nature of the proposed use or uses in the property.
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> "A reasonable person would * * * not assume that an annexation would change the classification of a land's zoning use [sic] unless a description of the changes was included.[7] A reasonable person would only assume that the abbreviations were changing, not the underlying zoning from residential to commercial." Petitioner's Reply in Opposition to Motion to Dismiss 10.

The "defects" in the notice that petitioner identifies, assuming they are defects, are at most failures to comply with the notice content requirements for quasi-judicial land use hearings in ORS 197.763(3). While a notice of quasi-judicial hearing's failure to comply with one or more of the requirements of ORS 197.763(3), where it applies, could also constitute a failure to "reasonably describe the local government's final actions," that is a separate inquiry. *See*

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[6] Petitioner argues the city misapplied the HVDO matrix that governs converting county planning and zoning to city planning and zoning and erroneously identified the existing county zoning on one of the properties. However, petitioner does not argue that the appealed ordinance applied different city zoning than the city zoning that was identified in the notice of hearing.

[7] We describe later our understanding of what petitioner means by "description of the changes."

Bigley, 168 Or App at 514 (failure to comply with ORS 197.763(3) must be "sufficient in degree to give rise to the tolling remedy prescribed by ORS 197.830(3)"). To take advantage of the delayed filing deadline under ORS 197.830(3), petitioner must demonstrate that the annexation and rezoning action that was adopted by the appealed ordinance on April 21, 2009, was different from the annexation and rezoning proposal described in the March 13, 2009 notice "to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions * * *." As we have already explained, the ordinance annexes the same properties and applies the same city zoning to those properties that were described in the notice of hearing.

Petitioner's only real attempt to avoid the fact that the proposed annexation and zoning and adopted annexation and zoning are identical is to argue that "[a] reasonable person would * * * not assume that an annexation would change the classification of a land's zoning use [sic] unless a description of the changes was included." Although unclear, we understand petitioner to argue a reasonable person would not understand from the notice of hearing on annexation that the zoning for some properties was to be changed from a county residential zone to a city commercial zone, because the notice used abbreviations and acronyms for existing and proposed zoning.[8]

[8] The notice showed the current county zoning for three of the properties as R-10/OA was to be changed to the city's MUC zone. The county R-10 zone is a residential zone; the county OA zone is a commercial zone. HVDO Table 16.67.070-1. The city's MUC zone is a commercial zone. *Id*. Because the county's existing zoning for these three properties appears to be both a residential and a commercial zone, it is not entirely accurate to say the zoning for these three properties changed from a county residential zone to a city

Any suggestion that the notice did not clearly state that city zoning was to be applied upon annexation in place of the pre-annexation county zoning is simply wrong. The notice made it quite clear that zoning was to be changed from county to city zoning. Petitioner is correct that the city zoning that was to be applied to the ten properties was identified in the notice of hearing using the abbreviated references and acronyms (R-5, R-10, R-15, IPU, and MUC) without specifying what the abbreviations and acronyms stand for. The existing county zoning also was identified with abbreviated zoning district references and acronyms. However, we do not agree that a reasonable person would assume that because the existing county zoning and proposed city zoning were identified with abbreviations the proposed rezoning was a non-substantive change of abbreviations only. A reasonable person would not assume that a city zoning district that is replacing a county zoning district is substantively the same zoning district, even if the county and city zoning district sometimes use the same abbreviations. And a reasonable person certainly would not assume a change from one county zoning district abbreviation to a different city zoning district abbreviation or acronym would not result in a substantive change in zoning. At the very least a reasonable person would be put on inquiry notice that the proposed change in zoning districts might be a substantive change. The notice states that "[t]he decision–making criteria, application, and records concerning this matter are available at The City of Happy Valley City Hall," and the notice provides an address and phone number for inquiries. Motion to Dismisss, Exhibit A, page 4. If inquiry

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commercial zone. However, this is one of many disputes between the parties that we need not resolve to answer the jurisdictional question presented by the city's motion to dismiss.

had been made, or the HVDO itself had been consulted, it would be easy to learn that the city's R-5, R-10 and R-15 are residential land use districts that allow residential development at different densities, that the IPU district is the city's "Institutional and Public Use" district that allows a variety of institutional and public uses, and the MUC district is the city's "Mixed Use Commercial" district that allows a variety of commercial uses.

For the reasons set out above, the delayed deadline for filing a notice of intent to appeal to challenge the annexation and rezoning ordinance provided by ORS 197.830(3) does not apply in this case, and the deadline for filing the notice of intent to appeal is governed by ORS 197.830(9). The city provided notice of the hearing that it held in this matter to petitioner, and in fact held the hearing described in the notice. Petitioner has not established that the notice that the city gave petitioner prior to that hearing "did not reasonably describe the local government's final actions," within the meaning of ORS 197.830(3).

Petitioner does not argue his notice of intent to appeal was timely filed under ORS 197.830(9). Therefore, we agree with the city that petitioner's notice of intent to appeal was not timely filed, and that this appeal must be dismissed.

This appeal is dismissed.