BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PINNACLE ALLIANCE GROUP, LLC,
Petitioner,

vs.

CITY OF SISTERS,
Respondent,

and

MCKENZIE MEADOWS VILLAGE, LLC,
Intervenor-Respondent.

LUBA No. 2015-096

FINAL OPINION
AND ORDER

Appeal from City of Sisters.

Seth J. King, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Michael C. Robinson and Perkins Coie LLP.

Steven D. Bryant, Sisters City Attorney, Redmond, filed a response brief and argued on behalf of respondent.

Laurie Craghead and Laura Craska Cooper, Bend, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief was Brix Law LLP.

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

DISMISSED 04/11/2016

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 community development director's approval of a one-year extension of a master plan approval.

FACTS

The 2015 master plan extension decision that is the subject of this appeal is closely related to a 2015 master plan modification and site plan approval decision that is the subject of a different appeal, LUBA No. 2015-063.

A. Master Plan Modification and Site Plan Approval Decision

McKenzie Meadow Village (MMV) is a proposed multi-phase, mixed use development. A master plan for MMV was originally approved in 2010, as was a site plan for development of an 82-unit senior assisted and independent living facility as part of phase 1 of MMV. That 2010 master plan subsequently was modified in 2012. In a decision dated August 12, 2015, the city council approved a further modification of the 2010/2012 master plan and a new site plan to permit construction of 45 units of assisted living and 12 memory care units as part of phase 1 of MMV, in place of the 82-unit senior and assisted and independent living facility. In a decision issued this date in LUBA No. 2015-063, we remand that 2015 master plan modification and new site plan decision.

B. Master Plan Extension Decision

On October 19, 2015, after the city's August 12, 2015 decision that modified the 2010/2012 master plan and granted approval for a new site plan,

and while petitioner's appeal of that August 12, 2015 decision was pending before LUBA, the city's community development director administratively extended the 2010/2012 master plan approval, without a hearing. Petitioner was not aware of the requested extension and did not appear before the community development director. Petitioner learned of the October 19, 2015 decision on November 12, 2015, and 21 days later, on December 3, 2015, petitioner filed this appeal with LUBA.

STANDING

Generally, under ORS 197.830(9), the deadline for filing a notice of intent to appeal is 21 days "after the date the decision sought to be reviewed becomes final." In this case, if the ORS 197.830(9) deadline applied, the deadline would have expired on November 9, 2015. However, petitioner argues that it has standing to appeal under ORS 197.830(3), because the extension decision was made without a hearing.[1] To establish standing for an appeal of a land use decision made without a hearing, a petitioner is required to

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[1] ORS 197.830(3) 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:
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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."

demonstrate that it is "adversely affected by the decision." [2] Persons who own property within sight or sound of property that is the subject of appeal are presumptively adversely affected by an appealed decision concerning the property. *See Goddard v. Jackson County*, 34 Or LUBA 402, 409 (1998) (adjacent property owner presumptively adversely affected); *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996) (same). Petitioner claims its property is located "approximately 6,280 feet" from the subject property, and petitioner does not claim that its property is within sight or sound. Accordingly there is no presumption that petitioner is adversely affected.

Petitioner asserts that it is adversely affected by the extension decision:

> "The Decision adversely affects petitioner's interests because the Decision authorizes a time extension for a development that will generate traffic impacts that will affect a nearby property owned by petitioner's entity ('Petitioner's Property'), impacts to transportation and water infrastructure that will serve Petitioner's Property, economic impacts that will impact use and development of Petitioner's Property, and violate petitioner's due process and equal protection rights." Petition for Review 4.

Petitioner attached an affidavit from petitioner's president, which includes assertions of the same impacts without any more detail.[3]

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[2] The city asserts that the extension decision is not a "land use decision," as ORS 197.015(10)(a) defines that term, because it is excluded from that definition as a ministerial decision under ORS 197.015(10)(b)(A). Because we agree with respondents that petitioner does not have standing to appeal under ORS 197.830(3), we need not address that assertion.

[3] Intervenor asserts that it was error for petitioner to not move for an evidentiary hearing when submitting its supporting affidavit. We have

The city asserts that petitioner is not adversely affected by the decision because the decision was simply an administrative extension of a master plan approval rather than a reauthorization, citing *Devin Oil., Inc. v. Morrow County*, 275 Or App 799, 365 P3d 1084 (2015). Intervenor concurs with the city, arguing that petitioner failed to state why the mere extension of the prior master plan approval results in an adverse impact on petitioner. In addition, intervenor argues that petitioner fails to demonstrate any adverse effect, noting that petitioner cites to no facts or evidence as to how its property would suffer any traffic impacts from the extension given that petitioner's property is more than a mile away. Intervenor generally characterizes petitioner's alleged adverse effects as "only conjecture[.]" Intervenor-Response Brief 3.

In *Devin Oil*, the Court of Appeals recently addressed the threshold for establishing standing under ORS 197.830(3), in the context of an appeal of a decision that granted an extension of a site plan authorization for a travel center. The court held that the analysis required to determine if a person is "adversely affected" by a ministerial decision that extends a site plan authorization is different from the analysis that is required to determine whether a person is adversely affected by a quasi-judicial decision that authorizes land uses in the first place. 275 Or App at 806.

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nevertheless considered the allegations in the affidavit, and because we ultimately conclude the affidavit is insufficient to establish petitioner will be adversely affected by the extension decision, we reject intervenor's objection to our consideration of the affidavit.

But here, petitioner appeals an extension of an existing master plan approval that would otherwise have expired, which is most accurately characterized as a reauthorization of the uses previously authorized by the 2010/2012 master plan. We assume for purposes of this opinion that the October 19, 2015 extension is accurately characterized as a reauthorization of the 2010/2012 master planned uses. ORS 197.830(3) requires petitioner to establish how the uses authorized by the extended master plan adversely affect its interests. Petitioner's brief and affidavit do not assert with any specificity an adverse effect. Petitioner merely asserts that the operation of the master plan will "impact" its interests. Asserting an impact without any explanation as to why it is adverse and without explaining how the decision results in an adverse impact is insufficient to establish standing under ORS 197.830(3). *See Navickas v. Jackson County*, 69 Or LUBA 20, 29, *aff'd* 263 Or App 406, 329 P3d 814 (2014) (speculation that a parking lot will adversely affect water quality and use of a nearby trail is insufficient to demonstrate adverse effect). In particular, we reject petitioner's undeveloped claim that the fact that MMV may use the same city road and water system as petitioner, whose property is located over a mile away from MMV, is sufficient to demonstrate that MMV's extended master plan will adversely affect petitioner. Finally, petitioner's undeveloped assertions that the decision will have "economic impacts" and "violat[es] petitioner's due process and equal protection rights" also lack

sufficient specificity to demonstrate an adverse effect for purposes of establishing standing under ORS 197.830(3).

Accordingly, petitioner has not established that it has standing to bring this appeal.

The appeal is dismissed.