BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KATHYRN PHILLIPS
Petitioner,

vs.

CITY OF CORVALLIS
Respondent,

and

LEGEND HOMES,
Intervenor-Respondent.

LUBA No. 2016-123

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Kathryn Phillips, Corvallis, represented herself.

David E. Coulombe, Deputy City Attorney, Corvallis, represented respondent.

Paul R. Hribernick, Portland, represented intervenor-respondent.

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

DISMISSED 05/03/2017

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 Corvallis Planning Commission Order No. 2015-014. That Order concerns a 7.4-acre property owned by intervenor-respondent and approves: (1) a zoning map amendment for a portion of the property from one residential zone to another residential zone, (2) permission for the applicant to deviate from Block Perimeter Standards, and (3) a 37-lot subdivision (Sylvia Subdivision).

MOTION TO INTERVENE

Legend Homes, the applicant below, moves to intervene on the side of respondent. There is no objection to the motion, and it allowed.

JURISDICTION

A. Introduction

The city requested that the jurisdictional issue in this appeal be resolved without requiring the city to transmit the record. We granted that request, assuming that the parties would provide us with the necessary documents to establish the relevant facts necessary to resolve the jurisdictional question. Unfortunately, the parties' pleadings in some cases assert that important documents are attached to the pleadings, but those documents are not attached. And where that has been the case, the promised documents have trickled in with subsequent pleadings, with little or no explanation or confusing explanation. We have done our best to sort out the important relevant facts.

1 **B. Motions to Dismiss**

2 Respondent and intervenor-respondent (respondents) move to dismiss
3 this appeal, arguing petitioner failed to appear in the proceedings below, as
4 required by ORS 197.830(2)(b), failed to exhaust available administrative
5 remedies, as required by ORS 197.825(2)(a), and that the appeal was filed long
6 after the 21-day deadline imposed by ORS 197.830(9) expired. For the reasons
7 explained below, we agree with respondents that petitioner's notice of intent to
8 appeal was not timely filed, and for that reason dismiss this appeal.
9 OAR 661-010-0015(1)(a).[1]

10 **C. The City's Notices and Decision**

11 **1. The February 12, 2015 Notice of Hearing**

12 The city planning commission held a hearing on intervenor's application
13 on March 4, 2015. Three weeks prior to that March 4, 2015 hearing, on
14 February 12, 2015, the city mailed written notice of that hearing to a number of

---

[1] OAR 661-010-0015(1)(a) provides:

> The Notice [of Intent to Appeal], together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3)–(5). A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed."

1 people, including petitioner. There is no dispute that petitioner received that
2 prior written notice of the March 4, 2015 planning commission hearing on
3 Sylvia Subdivision.

4 **2. The March 18, 2015 Decision and Notices**

5 The March 4, 2015 planning commission hearing was continued to
6 March 18, 2015, for the planning commission to adopt a written decision.
7 Petitioner did not appear at either the March 4, 2015 hearing or the March 18,
8 2015 continued hearing. The planning commission adopted Order 2015-014 on
9 March 18, 2015. That planning commission decision was subject to appeal to
10 the city council. Corvallis Land Development Code (LDC) 2.19.30.02.d;
11 2.19.30.04.

12 Sometime after March 18, 2015, the city mailed a "Notice of Potential
13 Land Use Public Hearing" to a number of persons, including petitioner. That
14 notice gave notice of the planning commission's decision approving the
15 "'Sylvia Subdivision' Zone Change, Subdivision, and Minor Lot Development
16 Option." Petitioner's February 24, 2017 Pleading, Exhibit B-1. The notice
17 stated that a hearing before the city council on April 20, 2015, was tentatively
18 scheduled in the event the planning commission's decision was appealed.[2]

---

[2] The notice includes a note at the bottom that explained:

> "Due to State-required land use decision deadlines, and Land Development Code notice requirements, this announcement is being released prior to the completion of the legal appeal period for the Planning Commission's decision on the land use cases

The March 18, 2015 planning commission decision was not appealed to the city council. Because no party appealed that March 18, 2015 decision to the city council, under LDC 2.19.30.07, the decision became final March 31, 2015, when the appeal period expired.

Apparently, on the same date the city mailed the "Notice of Potential Land Use Public Hearing" it also mailed a "Notice of Disposition." That Notice of Disposition included the planning commission decision's conditions of approval, including Condition 10, which is discussed below. The Notice of Disposition provided information on how to appeal the planning commission's decision to the city council. The parties dispute whether the Notice of Disposition was mailed to petitioner. Respondents claim that it was; petitioner denies ever receiving a mailed copy of the Notice of Disposition.

For the reasons explained below, the critical notice in this matter is the city notice of the March 4, 2015 planning commission meeting. We therefore need not resolve the parties' disputes about the Notice of Disposition.

D. Condition 10

The planning commission decision includes a condition of approval (Condition 10).[3] Condition 10 requires that the applicant construct a sidewalk

---

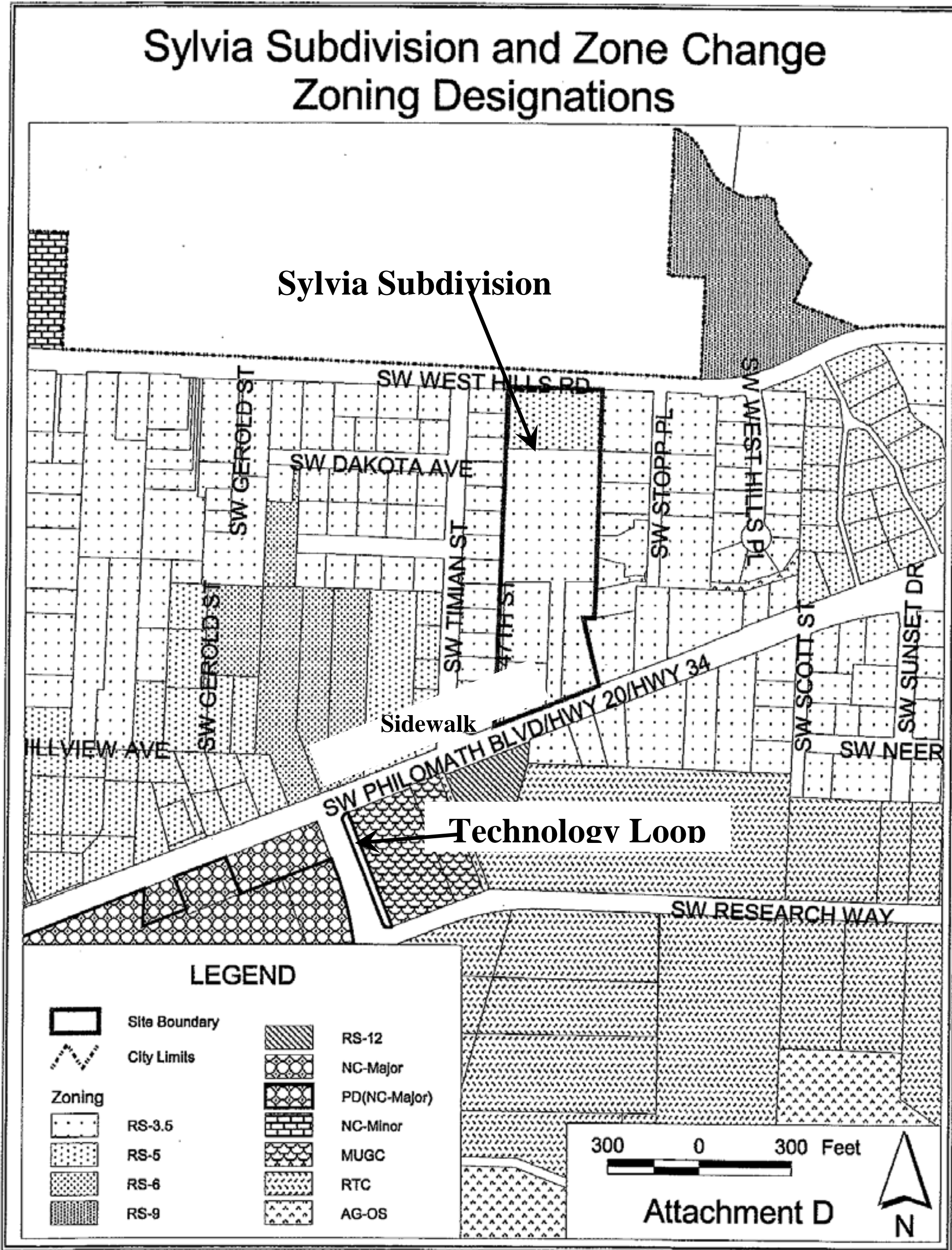
> identified above. Please call the Planning Division, at 766-6908, after March 31, 2015, to confirm if the City Council hearing will be necessary." *Id*.

[3] Condition 10 provides, in part:

from the entrance of the subdivision on SW Philomath Boulevard, located approximately 100 feet east of SW Timian Street, in a westerly direction along the north side of SW Philomath Boulevard past SW Timian Street to the northeast corner of the intersection SW Philomath Boulevard with Technology Loop. That intersection is approximately 500 feet to the west of the Sylvia Subdivision entrance. A map from the record with the location of the sidewalk shown is included on the next page.

Petitioner owns two lots that are affected by the off-site sidewalk improvements required by condition 10. It appears those two lots are the two lots nearest the Technology Loop/SW Philomath Boulevard intersection, on the north side of Philomath Boulevard, near the western end of the sidewalk. Petitioner rents the houses located on those two lots to other individuals. During the fall of 2016, petitioner and intervenor engaged in an increasingly contentious dispute over the manner in which intervenor was constructing the sidewalk along SW Philomath Boulevard. Petitioner requested and received a copy of the challenged decision on December 6, 2016. Petitioner then filed this appeal 21 days later, on December 27, 2016.

> "Extension of Sidewalk to Technology Loop – Subject to review, approval and permitting by ODOT and concurrent with the public street improvements for the site, a sidewalk with a minimum width of 6 feet (unless otherwise specified by ODOT) shall be constructed from the site to the pedestrian signal pedestal on the NE corner of Philomath Blvd and Technology Loop. * * *"Respondent's Motion to Dismiss, Appendix A 7.



E. Petitioner's Legal Theory

Petitioner has the burden to establish that LUBA has jurisdiction to consider this appeal. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232

1 (1985). Among the things petitioner must do to establish that LUBA has
2 jurisdiction is demonstrate that this appeal was timely filed.

3 ORS 197.830(9) sets out the generally applicable deadlines for filing an
4 appeal to LUBA, and for most land use decisions it is measured from the date a
5 land use decision becomes final or from the date notice of a decision is mailed
6 to persons entitled to notice under ORS 197.615, for post-acknowledgment
7 plan and land use regulation amendments. Petitioner's notice of intent to
8 appeal was not filed until December 27, 2016, over 20 months after the
9 decision became final under local law. Petitioner does not claim that her notice
10 of intent to appeal was timely filed under ORS 197.830(9).

11 Petitioner's legal theory for why this appeal should be considered timely
12 filed has evolved with the pleadings. The only possible statutory authority that
13 petitioner has cited for treating this appeal as timely filed, is ORS 197.830(3). [4]
14

---

[4] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), *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:
>
> "(a) Within 21 days of actual notice where notice is required; or

We limit our consideration to that statute.[5]

Petitioner contends the notice of hearing that she received "did not reasonably describe the local government's final actions" in this matter. *See* n 4. We understand petitioner to contend that because the planning commission promised to provide written notice of the decision to property owners who were to be affected by Condition 10, the 21-day deadline is measured from the date she received actual notice of the decision under ORS 197.830(3)(a), or December 6, 2016. Petitioner contends her December 27, 2016 notice of intent to appeal was therefore timely filed.

F. Decision

1. Petitioner is not Entitled to Take Advantage of ORS 197.830(3)

There are a number of problems with petitioner's legal theory. The parties disagree whether the notice of hearing that petitioner concedes she received "did not reasonably describe the local government's final actions."

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

[5] If all the challenged decision did was approve the subdivision, ORS 197.830(5), which applies to limited land use decisions, might apply. ORS 197.830(5) includes language that substantively identical to the italicized language in ORS 197.830(3). In some of her pleadings petitioner cites and attempts to rely on ORS 197.830(5). But the challenged decision does more than approve the subdivision, so ORS 197.830(3), not ORS 197.830(5), applies here.

1 They also disagree about whether the deadline set out at ORS 197.830(3)(a)
2 ("actual notice") or 197.830(3)(b) ("knew or should have known") applies.
3 They further disagree about when petitioner "knew or should have known" of
4 the planning commission's March 18, 2015 decision, if ORS 197.830(3)(b)
5 applies.

6 But a threshold issue is presented with ORS 197.830(3), which the city
7 argues in this case makes ORS 197.830(3) unavailable to petitioner, even if her
8 version of the facts is true. Petitioner does not respond to that threshold issue.
9 We turn first to that issue.

10 Petitioner's property is more than 100 feet from Sylvia Subdivision.
11 Sylvia Subdivision and petitioner's property are located within an
12 acknowledged urban growth boundary. The city argues that because
13 petitioner's property is more than 100 feet from Sylvia Subdivision, the city
14 was not required to provide notice of the planning commission hearing to
15 petitioner under ORS 197.763(2)(a)(A).[6] Petitioner does not argue she was

---

[6] ORS 197.763 sets out the statutory procedures for quasi-judicial land use proceedings. The city's decision in this case was quasi-judicial, and petitioner does not argue otherwise. As relevant, ORS 197.763(2)(a) imposes the following requirements for notice of a quasi-judicial land use hearing:

> "Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

1 entitled to notice of hearing under ORS 197.763(2)(a)(A) or any other statute.
2 Although the city mailed petitioner notice of the March 4, 2015 planning
3 commission hearing to petitioner, and petitioner concedes she received that
4 notice of hearing, petitioner was not entitled by *statute* to that notice of
5 hearing.

6 As the city correctly points out, the Court of Appeals recently, and
7 exhaustively, considered one aspect of ORS 197.830(3). *Aleali v. City of*
8 *Sherwood*, 262 Or App 59, 325 P3d 747 (2014). *Aleali* concerned the "local
9 government makes a land use decision without providing a hearing" prong of
10 ORS 197.830(3). *See* n 4. The Court of Appeals concluded that that prong of
11 ORS 197.830(3) included (1) cases where a local government held no hearing
12 at all, and also (2) cases where the local government held a hearing but failed to
13 provide the petitioner a notice of hearing that the petitioner was entitled to
14 under state law:

> 15 "[W]e conclude that LUBA did not err in construing the phrase
> 16 'without providing a hearing' in that statute to mean either that a
> 17 hearing on the land use decision was not held at all, or that a
> 18 hearing was held, but was not practically "provid[ed]," because a
> 19 petitioner was not given the prehearing notice and resulting
> 20 opportunity to participate in the hearing that is required by state
> 21 law. 262 Or App at 76-77.

"(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary[.]"

The Court of Appeals relied heavily on contextual statutes and concluded that failure to give a notice of hearing that is required only under *local* law does not allow a petitioner to file a delayed notice of intent to appeal under ORS 197.830(3):

> "That context supports reading ORS 197.830(3) similarly, to set LUBA appeal rights solely by the operation of state—as opposed to local—law." *Id*. at 76.

The only remaining question is whether the other prong of ORS 197.830(3) ("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") similarly is limited to notices of hearing that are required by state law. There can be no serious question that the text and contextual analysis that led the Court of Appeals to conclude the "without providing a hearing" prong of ORS 197.830(3) is only implicated by a failure of notice of hearing that is required by *state* law, would also lead the Court of Appeals to conclude a defective notice of hearing, one that does "not reasonably describe" the final action under the other prong of ORS 197.830(3), also must be a statutorily required notice of hearing. Under the Court of Appeals' reasoning in *Aleali*, because the notice of hearing petitioner complains of was not required by state law, petitioner has no right to file a notice of intent to appeal under ORS 197.830(3), without regard to whether the notice of hearing that petitioner actually received failed to reasonably describe

the city's final action, and regardless of when petitioner received actual notice of the planning commission's March 18, 2015 decision or knew or should have known of that decision.

2. Even if ORS 197.830(3) Applies in this Case, Petitioner's Notice of Intent to Appeal was Filed More Than 21 Days After Petitioner Knew or should have Known of the City's Decision

Finally, even if petitioner was entitled by statute to notice of *hearing* and even if we assume without deciding that the notice of *hearing* petitioner received did not reasonably describe the city's ultimate decision, petitioner's appeal was not timely filed. Petitioner does not claim she was entitled to notice of the *decision* under any statute or the LDC, only that the planning commission and planning staff intended to provide the Notice of Disposition to all property owners who might be affected by the sidewalk. So even if the city did not mail written Notice of Disposition, as petitioner suggests, such notice of the decision was not "required," within the meaning of ORS 197.830(3)(a). Therefore, even if ORS 197.830(3)(b) applies, ORS 197.830(3)(b), rather than ORS 197.830(3)(a) applies. *See* n 4.

Under ORS 197.830(3)(b), the deadline for petitioner to file her notice of intent to appeal expired 21 days after petitioner "knew or should have known of the decision." We explained in *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002) how the ORS 197.830(3)(b) "knew or should have known" deadline for filing a notice of intent to appeal operates:

> "[I]t is clear under ORS 197.830(3)(b) that where a petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision, the petitioner is placed on inquiry notice. If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice."

The question is whether petitioner had inquiry notice, that the planning commission approved Sylvia Subdivision with a condition that required construction of the disputed sidewalk, more than 21 days before she requested and received a copy of the decision on December 6, 2016. We conclude that she clearly did.

Our starting points are the two notices the petitioner concedes she received. The notice of the March 4, 2015 planning commission hearing gave petitioner notice that the city was considering approving a zoning map amendment, a variance, and the 37-lot Sylvia Subdivision. The Notice of Potential Land Use Hearing that was mailed to petitioner after the planning commission approved the Sylvia Subdivision on March 18, 2015, gave petitioner notice that the subdivision had been approved. At this point the only material thing about the Sylvia Subdivision that petitioner might be able to claim she was unaware of, is the condition that required the off-site sidewalk improvements from the subdivision entrance to Technology Loop.

Attached to intervenor's February 23, 2017 Reply are several e-mail messages between petitioner and intervenor's agent Goodrich. Those messages

include messages dated November 2015, over a year before this appeal was filed, that include the subject line "Sylvia Subdivision-Temp S/W" and show petitioner was concerned with some actions taken by intervenor's subcontractors regarding a temporary sidewalk. In a June 6, 2016 e-mail message with the subject line "Sylvia Subdivision Update," Goodrich advised petitioner

> "Grading began on the Sylvia Subdivision today.
>
> "At this point [the subcontractor's] schedule does not anticipate work on the offsite path impacting your property until later in the project. August? I've spoken with the contractor about keeping you and the other impacted neighbors informed as we get closer." Intervenor-Respondent's Reply, Attachment 1, Page 006.

Petitioner responded "Thanks for your Sylvia update! will inform renters." *Id.* at Page 007.

This e-mail exchange demonstrates that no later than June 6, 2016 petitioner was on inquiry notice that the March 18, 2015 planning commission decision approving the subdivision required off-site sidewalk improvements that affected her property. Petitioner's December 27, 2016 notice of intent to appeal was not filed until over six months later.

The e-mail messages disclose a series of disagreements between intervenor and petitioner during the fall of 2016. A September 29, 2016 e-mail message includes the subject line "Sylvia Project – Corvallis Required Sidewalk." Intervenor-Respondent's Reply, Attachment 1, Page 012. Later, on November 17, 2016 in an e-mail message to Goodrich and the Oregon

Department of Transportation with the subject line "City Condition-Sylvia Subdivision-Legend Homes, petitioner stated:

> "Greetings
>
> "Today, I've spoken with City Attorney, James Brewer, and, I'm leaving resolution of the contentious ODOT-Sidewalk issue with him. My current conflict arose because a late-imposed 'Condition' that affected my property by requiring developer work on lands more than 300' beyond Applicant's subdivision property, and, affect property owners like myself, who did not receive a required Public Notice, and thus were denied participation in Land Use Action. * * * *Id*. at Page 027.

It may be, as petitioner claims, that she did not actually see a copy of the March 18, 2015 planning commission decision until December 6, 2016. But given the above e-mail messages, petitioner simply cannot credibly claim to have been unaware that the planning commission's March 18, 2015 decision approving the Sylvia Subdivision included a condition requiring the off-site improvements until she obtained that copy of the decision. No later than June 6, 2016, petitioner was placed on inquiry notice that the city's March 18, 2015 approval of the Sylvia Subdivision included a condition of approval that required construction of the sidewalk near her property. After being placed on inquiry notice on June 6, 2016, petitioner delayed inquiring with the city to obtain a copy of the city's decision for six months, until December 6, 2016, which by no means represents a "timely inquiry" under *Rogers*. In fact, petitioner's November 17, 2016 e-mail message, by specifically mentioning the subdivision condition of approval concerning the disputed sidewalk,

1 demonstrate she knew of the decision by that date.[7] Accordingly, the deadline
2 to appeal the city's decision expired 21 days after petitioner was placed on
3 inquiry notice. Petitioner's notice of intent to appeal was not filed until over
4 six months after June 6, 2016 and 40 days after November 17, 2016.
5 Petitioner's notice of intent to appeal was filed more than 21 days after she
6 "knew or should have known" that the planning commission's March 18, 2015
7 decision approving Sylvia Subdivision included that condition, and for that
8 reason was not timely filed under ORS 197.830(3)(b).
9 For the reasons set out above, this appeal was not timely filed, and for
10 that reason this appeal is dismissed. OAR 661-010-0015(1)(a). *See* n 1.

---

[7] To be clear, we do not view the November 17, 2016 e-mail message as evidence that petitioner merely had inquiry notice of the decision on that date, but rather as evidence that petitioner already knew of the decision by that date, even if she did not actually see a copy of that decision until December 6, 2016.