BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GENE LEYDEN,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

EUGENE CIVIC ALLIANCE,
Intervenor-Respondent.

LUBA No. 2018-114

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, represented petitioner.

Lauren A. Sommers, Eugene, represented respondent.

William K. Kabeiseman, Portland, represented intervenor-respondent.

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

DISMISSED 02/08/2019

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a zone verification by a city planner that verified an outdoor athletic field and neighborhood center as permitted uses of the subject property.

FACTS

Intervenor-respondent Eugene Civic Alliance (intervenor) and the City of Eugene (the city) (collectively, respondents) filed a joint motion to dismiss before the record was transmitted and we subsequently issued an order suspending all deadlines in this appeal proceeding. *Leyden v. City of Eugene*, ___ Or LUBA ___ (LUBA No 2018-114, Order, Oct 17, 2018). Our review is generally confined to the local record, except that we "may take evidence and make findings of fact" "[i]n the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, * * * or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand." ORS 197.835(2). Pursuant to ORS 197.835(2), we may make our own factual findings as to whether an appeal was timely filed. *Rogue Advocates v. Jackson County*, 282 Or App 381, 388 n 4, 385 P3d 1262 (2016); *see also Grimstad v. Deschutes County*, 74 Or LUBA 360, 362 n 1 (2016), *aff'd*, 283 Or App 648, 389 P3d 1197 (2017) (LUBA may consider evidence outside the record, even in the absence of a motion to take evidence outside the record under OAR 661-010-0045, for the limited purpose of resolving disputes regarding LUBA's jurisdiction).

We take the facts from the parties' pleadings, attached documents, and our prior decision in *Richardi v. City of Eugene*, ___ Or LUBA ___ (LUBA Nos 2018-082/083, Oct 24, 2018), *aff'd*, 295 Or App 840, __ P3d __ (2019). The material facts are not in dispute. We make findings herein as necessary to determine whether the appeal was timely filed.

Petitioner's property is adjacent to the subject property and is developed with a single-family dwelling. The subject property is comprised of approximately 9.34 acres, is zoned Public Land (PL), and is the former site of the historic Civic Stadium, which was destroyed by fire in the summer of 2015. In October 2015, intervenor applied for a zone verification pursuant to Eugene Code (EC) 9.1080, to determine whether intervenor's intended uses are permitted on the property.[1] The city responded in a letter to intervenor dated November 9, 2015

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[1] EC 9.1080 provides:

> "**Zone Verification.** Zone verification is used by the city to evaluate whether a proposed building or land use activity would be a permitted use or be subject to land use application approval or special standards applicable to the category of use and the zone of the subject property. The city may use zone verification as part of the review for a land use application or development permit, or where required by this land use code. As part of the zone verification, the planning and development director shall determine whether uses not specifically identified on the allowed use list for that zone are permitted, permitted subject to an approved conditional use permit or other land use permit, or prohibited, or whether a land use review is required due to the characteristics of the development site or the proposed site. This determination shall be based on the

(2015 Zone Verification), which explained that the proposed uses are outright permitted uses in the PL zone as an outdoor athletic field and neighborhood center. EC 9.2682(1)(d) (listing public or semi-public uses permitted in the PL zone). The 2015 Zone Verification was documented in the city's publicly accessible permit tracking system. *See* ORS 227.175(11)(a) (requiring a zoning classification decision described in ORS 227.160(2)(b) to be entered into a public registry).

Petitioner did not receive written notice from the city apprising her of the 2015 Zone Verification. A zone verification is not a statutory land use "permit" as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. A zone verification decision is subject to LUBA review and a 21-day appeal period. *See* ORS 227.160(2)(b); ORS 227.175(11); ORS 197.830(5)(b).[2]

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requirements applicable to the zone, applicable standards, and on the operating characteristics of the proposed use, building bulk and size, parking demand, and traffic generation. Requests for zone verification shall be submitted on a form approved by the city manager and be accompanied by a fee pursuant to EC Chapter 2." (Boldface and underscoring in original.)

[2] ORS 227.160(2)(b) provides:

"(2) 'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:

"* * * * *

On October 20, 2017, intervenor applied for site review, adjustment review, and traffic impact analysis review for an outdoor athletic field and neighborhood center on the subject property (2018 Site Review). The city planning director approved the application with conditions. Other neighboring property owners and intervenor appealed that decision to the city hearings officer, who approved the application with conditions after a public hearing. The other

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> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]"

ORS 227.175(11) provides:

> "A decision described in ORS 227.160(2)(b) shall:
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> "(a) Be entered in a registry available to the public setting forth:
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> "(A) The street address or other easily understood geographic reference to the subject property;
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> "(B) The date of the decision; and
>
> "(C) A description of the decision made.
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> "(b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.
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> "(c) Be subject to the appeal period described in ORS 197.830(5)(b)."

ORS 197.830(5)(b) provides that a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required."

neighboring property owners appealed the hearings officer's decision to LUBA. We affirmed and rejected the petitioners' challenges to the 2015 Zone Verification as impermissible collateral attacks on a final, unappealed land use decision. *Richardi*, __ Or LUBA at __ (slip op at 12). Alternatively, we addressed and rejected the petitioners' challenges to the code interpretations embodied in the 2015 Zone Verification decision that were applied in the 2018 Site Review decision. The neighboring property owners sought judicial review and the Court of Appeals affirmed. *Richardi*, 295 Or App 840.

The petitioner in the present appeal, Leyden, was not a party to the *Richardi* appeal. In February, March, and April 2018, the city provided petitioner at least four notices of the 2018 Site Review, which are described further below. Petitioner did not inquire with the city regarding intervenor's right to develop the subject property as an outdoor athletic field and neighborhood center and she did not participate in any manner in the 2018 Site Review proceedings. Petitioner first received actual notice of the 2015 Zone Verification on September 14, 2018, when a neighboring property owner provided her a copy of the 2015 Zone Verification. Four days later, on September 18, 2018, petitioner filed with LUBA a notice of intent to appeal the 2015 Zone Verification.[3]

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[3] Petitioner notes that she filed her appeal within three years of the date of the challenged decision. ORS 197.830(6) provides:

> "The appeal periods described in subsections (3), (4) and (5) of this section:

In a declaration attached to her notice of intent to appeal, petitioner alleges that she is adversely affected by the 2015 Zone Verification due to anticipated access and traffic impacts to her adjacent property from the approved uses of the subject property. Petitioner asserts that, had she been informed by the city of the 2015 Zone Verification request, she would have participated in that decision and if the city's decision remained the same, she would have appealed that decision to LUBA. We accept those allegations as true for the purposes of this decision.[4]

MOTION TO DISMISS

Respondents move to dismiss the appeal as untimely filed. A notice of intent to appeal must be filed within 21 days after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3)–(5).

> "(a) May not exceed three years after the date of the decision, except as provided in paragraph (b) of this subsection.
>
> "(b) May not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided."

[4] It is not clear to us whether or how a third party might participate in a request for a zone verification under the city's code. However, we accept as true petitioner's allegation that she would have opposed and appealed the zone verification.

Untimely filing of a notice of intent to appeal will result in LUBA dismissing the appeal. OAR 661-010-0015(1)(a).[5]

A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 227.175(11); ORS 197.830(5)(b); see n 2. Respondents argue that petitioner "should have known" of the 2015 Zone Verification more than 21 days before petitioner filed her notice of intent to appeal on September 18, 2018. The parties do not dispute that the motion to dismiss is controlled by ORS 197.830(5)(b). See n 2. However, the parties do not cite to us any case in which we have applied ORS 197.830(5)(b); instead, the

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

"(1) Filing of Notice:

> "(a) The Notice, 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."

parties cite cases in which we applied ORS 197.830(3)(b). Because the phrase "should have known" in ORS 197.830(5)(b) is identical to the language in ORS 197.830(3)(b), we agree that the standard is the same.

We recently explained that standard in *Eng v. Wallowa County*, 76 Or LUBA 432, 452 (2017):

> "LUBA has interpreted the 'should have known' language in ORS 197.830(3)(b) to apply '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[.]' *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002); *see also Rogue Advocates v. Jackson County*, 282 Or App 381, [389], 385 P3d 1262 (2016) (assuming without deciding that *Rogers* correctly construes ORS 197.830(3)(b)). In that circumstance, the petitioner is placed on 'inquiry notice.' As we explained in *Rogers*, 'inquiry notice' means that:
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> "'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.' *Id.*"

A party who is put on inquiry notice is obligated to make timely and reasonable inquiry, or risks forfeiting the right to appeal. Inquiry notice requirements for land use and limited land use decision appeal deadlines serve the overarching legislative policies favoring finality and timely review of land use decisions. *See* ORS 197.805 (expressing the legislative policy "that time is of the essence in reaching final decisions in matters involving land use"). Reasonable inquiry includes such actions as inquiring with the local

government's planning department and reviewing the public planning file for the subject property. That inquiry obligation does not demand general and constant vigilance, but instead requires diligent efforts to obtain a copy of the challenged decision, after sufficient triggering observations or information that would lead a reasonable person to suspect that the decision exists.

We explained the inquiry obligation in *Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 390 (2000):

> "Determining the date a petitioner 'should have known' of the decision that is appealed * * * is not complicated where a petitioner has no reason to suspect that the decision was made until the petitioner is given a copy of the decision. However, where there are circumstances that would lead a reasonable person to realize that an appealable land use decision may have been rendered, it is necessary to consider whether a reasonable person would have made appropriate inquiries and thereby discovered the actual decision or confirmed the existence of the decision. We emphasize that the obligation to make reasonable inquires * * * is an objective one, and it turns on what a reasonable person would do rather than what the petitioner actually did. Therefore, if a petitioner observes activity that would reasonably suggest that an appealable land use decision may have been adopted, the petitioner is obligated * * * to make appropriate inquiries with the local government and discover the decision. If the petitioner does so and files an appeal within 21 days after discovering the decision, the appeal is timely * * *. However, if the petitioner fails to make such appropriate inquiries, the 21-day appeal period nevertheless begins to run."

In other words, timely inquiry "tolls" the appeal deadline until the party discovers the challenged decision. *See Rogue Advocates*, 282 Or App at 389 (so stating).

In *Neelund v. Josephine County*, 52 Or LUBA 683, *aff'd*, 210 Or App 368, 150 P3d 1115 (2006), the petitioners opposed development of a dwelling for which the county had issued a development permit on June 6, 2005 (the dwelling permit). The petitioners disputed that they had received notice of the dwelling permit. The applicants requested a height variance for the dwelling (the variance request). On March 21, 2006, the county sent notices of the variance request to the petitioners. That notice invited the petitioners to view the planning file. On May 4, 2006, the petitioners filed their notice of intent to appeal the dwelling permit. Intervenor-petitioner Sommers intervened.

The county argued that the appeal was untimely because the March 21, 2006 notice of the variance request would put a reasonable person on inquiry notice that the county had approved a dwelling on the subject property, and the petitioners had failed to make timely inquiries. *Id.* at 695–96. We agreed.

The petitioners did not submit any evidence to LUBA relating how they had learned of the dwelling permit. We reasoned that the petitioners knew or should have known that the county had approved a dwelling on the subject property based on notice of the variance request. Despite that notice, the petitioners made no efforts to discover the decision that approved the dwelling, including reviewing the planning file, for a period of more than a month. Sommers was somewhat differently situated. He had not received notice of the variance request because he did not reside in the notice area. Instead, he learned of the variance request on the county's web site on or about March 22, 2006. That

same day, he requested information from the county by e-mail and received some information from the county the next day. Approximately one month later, he requested additional information from the county and obtained a copy of the permit.

We concluded that the petitioners and Sommers had been put on inquiry notice on approximately March 21, 2006 and had failed to make timely and reasonable inquiries. Thus, the 21-day appeal period began to run on approximately March 21, 2006 and expired before the petitioners filed the notice of intent to appeal on May 4, 2006. Accordingly, we dismissed the appeal.

We describe the four notices that respondents assert put petitioner on inquiry notice in this case. The February 16, 2018 notice of proposed land use action identified the subject property and invited petitioner to comment on the request for approval of a site review, traffic impact analysis, and adjustment review for a neighborhood center and athletic field. The notice also invited petitioner to review the public planning documents at the planning division and online. The March 26, 2018 notice of land use decision informed petitioner that the neighborhood center and outdoor athletic field were approved by the planning director and again invited petitioner to review the public files. The April 11, 2018 notice of public hearing, and the April 23, 2018 notice of rescheduled public hearing, informed petitioner of the *de novo* public hearing "for the development of a new neighborhood center with an athletic field" and invited petitioner to

review the planning file and participate in the public hearing to express her concerns about the development.

The land uses at issue in the 2018 Site Review are the same uses that the city reviewed in the 2015 Zoning Verification. Petitioner observes that, under the Eugene Code, site review regulates practical aspects of the development, while a zone verification determines whether the use is allowed on the subject property. Somewhat contradictorily, petitioner argues that nothing in the 2018 Site Review notices suggested that the city had issued the 2015 Zone Verification. Petitioner argues that an application for site review does not indicate that the applicant has obtained a prior land use approval and that it was reasonable for petitioner to assume that the proposed uses were allowed in the zone without prior approval. Petitioner's Response to Motion to Dismiss 6.

Goddard v. Jackson County, 34 Or LUBA 402 (1998), is instructive on this point. In that case, the county approved an application for two property line adjustments (PLA) without providing a hearing or notice of the decision. The applicants subsequently applied for approvals for two dwellings on the two parcels created by the PLA. The county mailed the petitioners notices of the dwelling applications. That notice caused one petitioner to inquire with the county and discover the PLA within ten days after the notice of the dwelling applications was mailed. The petitioners filed a notice of intent to appeal the PLA within 18 days of discovering the PLA. We observed that the dwelling applications did not refer to the PLA and concluded that the dwelling applications

and attached map would not themselves apprise a reasonable person of the PLA. Nevertheless, the dwelling applications triggered the petitioners to make a timely inquiry with the county to discover the PLA, and the petitioner filed their notice of intent to appeal within 21 days after they discovered the PLA. We concluded that the appeal was timely. *Id.* at 409–10.

Similarly, here, even though the 2018 Site Review notices do not refer to the 2015 Zone Verification, the 2018 Site Review notices contained sufficient information about the development of an outdoor athletic field and neighborhood center to trigger petitioner's obligation to inquire with the city regarding intervenor's right to develop those uses and any prior related land use decisions. We disagree with petitioner that her assumption that the disputed uses are outright permitted uses on the subject property negated her obligation to inquire. We find that petitioner was first put on inquiry notice on February 16, 2018, and was thereafter obligated to make timely inquiries. We further find that, had she inquired with the city, petitioner would have discovered the 2015 Zoning Verification because the city entered that decision in its public registry. Petitioner failed to make timely inquiries, and the 21-day appeal period expired before she filed her notice of intent to appeal. Accordingly, the appeal was untimely filed and must be dismissed. OAR 661-010-0015(1)(a); see n 5.

The appeal is dismissed.