

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 PORTLAND GENERAL ELECTRIC COMPANY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WEST LINN,
10 *Respondent,*

03/06/19 AM 8:56 LUBA

11
12 and

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14 CONFEDERATED TRIBES OF THE GRAND RONDE
15 COMMUNITY OF OREGON,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-119

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from the City of West Linn.

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25 Christopher W. Rich, Portland, represented petitioner.

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27 Timothy V. Ramis, Lake Oswego, represented respondent.

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29 Kimberly D'Aquila, Grand Ronde, represented intervenor-respondent.

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31 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
32 Member, participated in the decision.

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34 DISMISSED

03/06/2019

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

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NATURE OF THE DECISION

Petitioner appeals a decision by the city that determines that a platform to allow members of a Native American Tribe to harvest hatchery salmon and steelhead, proposed to be erected on rock outcroppings adjacent to a hydropower facility operated by petitioner within an area of the main channel of the Willamette River, is not regulated by the city’s comprehensive plan and zoning ordinance.

MOTION TO TAKE EVIDENCE

Intervenor-respondent Confederated Tribes of the Grand Ronde Community of Oregon (Tribes) move for LUBA to consider evidence not in the record in support of their motion to dismiss the appeal. We discuss the motion to dismiss separately in more detail below.

After petitioner objected, the Tribes withdrew their motion as to two of the three items of evidence they sought to be considered. The only remaining item of evidence the Tribes seek to have LUBA consider is an affidavit from intervenor’s staff attorney regarding dates and certain actions that occurred. The Tribes’ amended motion is allowed. *Grimstad v. Deschutes County*, 74 Or LUBA 360, 362 n1 (2016), *aff’d*, 283 Or App 648, 389 P3d 1197 (2017) (LUBA may consider evidence outside the record for the limited purpose of resolving disputes regarding LUBA’s jurisdiction).

1 **FACTS**

2 OAR 635-041-0610(3)(c)(B) authorizes the Tribes to harvest hatchery
3 salmon and steelhead at Willamette Falls from a “platform erected by the
4 Tribe[s],” to be constructed at a location mutually agreed on by the Tribes and
5 the Oregon Department of State Lands (DSL). In order to facilitate construction
6 of a platform, the Tribes submitted to DSL a Waterway Structure Registration
7 Application (Application). Section 4 of the Application requires inclusion of a
8 Certificate of Compliance signed by the local planning authority. Record 3-4.
9 The Tribes provided the Application to the city’s planning manager, and on
10 August 8, 2018, the planning manager signed Section 4 of the Application,
11 checking the box on it that states that “[t]his project is not regulated by the local
12 comprehensive plan and zoning ordinance.” Record 4. The next day, on August
13 9, 2018, the Tribes submitted a completed Application to DSL. On September
14 28, 2018, petitioner filed its Notice of Intent to Appeal the city’s signed statement
15 included in Section 4 of the Application.

16 **JURISDICTION**

17 The challenged decision was made without providing a hearing. ORS
18 197.830(3) provides:

19 “If a local government makes a land use decision without providing
20 a hearing, except as provided under ORS 215.416 (11) or 227.175
21 (10) * * *, a person adversely affected by the decision may appeal
22 the decision to the board under this section:

23 “(a) Within 21 days of actual notice where notice is required; or

1 “(b) Within 21 days of the date a person knew or should have
2 known of the decision where no notice is required.”

3 The Tribes move to dismiss petitioner’s appeal on the basis that it was not filed
4 within the time limits set in ORS 197.830(3), because it was not filed within 21
5 days of the date that petitioner “knew or should have known” of the decision.¹
6 According to the Tribes, nothing in state law required the city to provide actual
7 notice of the decision to petitioner and accordingly, the only pathway for
8 petitioner to appeal the decision is pursuant to ORS 197.830(3)(b). The Tribes
9 argue that sometime prior to August 29, 2018, petitioner received a copy of the
10 Application, Section 4 of which included a copy of the challenged decision, and
11 accordingly “knew * * * of the decision.”

12 Petitioner has the burden to establish that LUBA has jurisdiction to
13 consider this appeal. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232
14 (1985). Among the things petitioner must do to establish that LUBA has
15 jurisdiction is demonstrate that this appeal was timely filed.

16 Petitioner does not argue that any provision of state law entitled petitioner
17 to notice of the decision, although petitioner cites some provisions of the West
18 Linn Development Code (WLDC) and argues that the WLDC required the city
19 to provide notice of the decision to petitioner. Accordingly, petitioner may not
20 appeal the decision pursuant to ORS 197.830(3)(a), which applies to appeals

¹ The Tribes also argue that petitioner failed to establish that it is “adversely affected” by the decision. Because we agree that the appeal was not filed within the limits established in ORS 197.830(3), we need not address that issue.

1 from a decision for which notice is required pursuant to state law. *Aleali v. City*
2 *of Sherwood*, 262 Or App 59, 73-77, 325 P3d 747 (2014).

3 Petitioner concedes that it received a copy of the Application on August
4 23, 2018. Declaration of J. Richard George in Support of Petitioner’s Response
5 to Tribes’ Motion to Dismiss (George Declaration). However, petitioner argues
6 that ORS 197.830(3)(b) required it to appeal the decision within 21 days of the
7 date petitioner had notice from its attorney that the city had made a land use
8 decision. According to petitioner, that did not occur until September 25, 2018,
9 when, after receiving a copy of the Application from petitioner on September 18,
10 2018, petitioner’s attorney notified petitioner that Section 4 of the Application
11 could be a “land use decision” within the meaning of ORS 197.015(10)(a).²

12 We disagree with petitioner’s arguments regarding how ORS
13 197.830(3)(b) applies to the challenged decision that was made without providing
14 a hearing. Here, petitioner concedes that it obtained a copy of the decision on
15 August 23, 2018.³ George Declaration 2. Petitioner’s possession of a copy of the

² The Tribes also argue that the challenged decision is not a “land use decision” within the meaning of ORS 197.015(10)(a), and petitioner responds that it is. Because we conclude that the appeal was not filed within the limits set in ORS 197.830(3)(b), we need not address those arguments.

³ According to petitioner, on August 29, 2018 petitioner sent a letter to DSL asking DSL to deny the Application “based on [petitioner’s] concerns over safety, FERC requirements, and operation of the PGE hydropower facility. PGE was not aware at this time that the city * * * had rendered any decision within or with regard to the Application.” George Declaration 3.

1 Application means that petitioner “knew” of the decision on that date by virtue
2 of that possession. *See Goddard v. Jackson County*, 34 Or LUBA 402, 410 (1998)
3 (petitioners timely filed their appeal when they filed the notice of intent to appeal
4 within 18 days after obtaining a copy of the decision). Because petitioner
5 possessed a copy of the decision, the facts of this appeal do not implicate the
6 concept of “inquiry notice,” the type of notice we explained in *Rogers v. City of*
7 *Eagle Point*, 42 Or LUBA 607, 616 (2002) (where a petitioner does not have
8 knowledge of the decision, but observes activity or otherwise obtains information
9 reasonably suggesting that the local government has rendered a land use decision,
10 the petitioner is placed on inquiry notice). In other words, having obtained a copy
11 of the decision, petitioner may not delay the 21-day appeal period by simply
12 failing to read the copy of the decision in its possession, recognize that it could
13 be a land use decision, or timely transmit a copy to its attorney.

14 Accordingly, the appeal is untimely filed.

15 The appeal is dismissed.