BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKENZIE BOWERMAN,
BOWERMAN FAMILY LLC,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

VERN EGGE,
Intervenor-Respondent.

LUBA No. 2016-008

ORDER

INTRODUCTION

In this appeal, petitioners seek review of a county planning director's decision approving nine property line adjustments. Those property line adjustments were approved by a single decision, on April 28, 2015, without a public hearing or written notice of the decision to anyone other the applicant. The applicant is the intervenor-respondent (intervenor) in this appeal. Those property line adjustments significantly reconfigure eight properties zoned Impacted Forest Lands, a forest zone adopted to implement Goal 4 (Forest Lands). Compare Record 80 (beginning configuration) with Record 214 (resulting configuration). Several months later, on August 19, 2015, the

planning director approved forest template dwellings for three of those eight reconfigured properties: property 3 (6.61 acres), property 5 (5.43 acres), and property 6 (7.86 acres). Those August 19, 2015 forest template dwelling approvals were subject to appeal locally, but apparently were not appealed.[1] Petitioners' notice of intent to appeal the April 28, 2015 property line adjustment decision was filed with LUBA on January 16, 2016, several months after the forest template dwelling approvals.

As we explain in more detail below, intervenor moves to dismiss this appeal. Petitioners filed a 22-page response to the motion to dismiss, along with a motion to take evidence not in the record to establish petitioners' standing to bring this appeal. Intervenor then filed a six-page reply, with lengthy exhibits that also include evidence that is not in the record that the county transmitted in this appeal.[2] Petitioners move to strike intervenor's reply. The motion to strike is denied. We allow the reply and have considered all pleadings, including petitioners' alternative sur-reply, and all the extra-record evidence submitted by the parties in resolving intervenor's jurisdictional challenge. *Jensen v. City of Eugene*, 69 Or OLUBA 234, 242 (2014);

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[1] Because they were not appealed locally, they became final on September 2, 2015.

[2] The exhibits include the forest template dwelling approval decisions for properties 3, 5 and 6.

Hardesty v. Jackson County, 58 Or LUBA 162, 164 (2009); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

MOTION TO DISMISS

A. Intervenor's Legal Theories

Intervenor moves to dismiss this appeal, arguing that LUBA lacks jurisdiction. Intervenor's jurisdictional challenge is based on two legal theories. First, with some statutory exceptions, LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). As defined by ORS 197.015(10)(a), a final local government decision that applies land use regulations is a land use decision. The challenged decision appears to be such a decision. However, ORS 197.015(10)(b) lists exceptions to the ORS 197.015(10)(a) definition of "land use decision[.]" One of those exceptions is for a decision of a local government "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]" ORS 197.015(10)(b)(A). Intervenor argues the April 28, 2015 property line adjustment decision falls within the ORS 197.015(10)(b)(A) exemption and that LUBA therefore lacks jurisdiction to review the April 28, 2015 property line adjustment decision. Most of petitioners' 22-page response to the motion to dismiss is devoted to advancing a number of different arguments that the ORS 197.015(10)(b)(A) exemption does not apply in this case.

Intervenor's second legal theory is that petitioners lack standing to appeal because their notice of intent to appeal was filed long after the general

ORS 197.830(9) 21-day deadline to appeal the April 28, 2015 property line adjustment decision expired.[3] In their response, petitioners argue that because the April 28, 2015 property line adjustment decision was rendered "without providing a hearing," the deadline for filing the notice of intent to appeal in this case is governed by ORS 197.830(3)(a), not by ORS 197.830(9) as intervenor assumed in his motion to dismiss.[4] Petitioners contend that because notice of the April 28, 2015 property line adjustment decision was required, ORS 197.830(3)(a) applies, and the 21-day deadline for filing the notice of intent to appeal did not begin until petitioners received actual notice. Petitioners contend that as of the date the notice of intent to appeal was filed with LUBA, the county had not provided petitioners with actual notice of the decision.

In his reply to petitioners' response to his motion to dismiss, intervenor takes the following position:

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[3] ORS 197.830(9) provides, in part:

> "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. * * *"

[4] 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 [LUBA] under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

> "Intervenor raised two substantive issues in its motion to dismiss: (1) subject matter jurisdiction (*i.e.*, the property line adjustment was a ministerial decision that is exempted from LUBA's jurisdiction), and (2) standing. Petitioner has responded with extensive and convoluted theories on both topics. Intervenor expects that LUBA will dismiss on the issue of standing, so this reply will be limited to the issue of standing. If LUBA does not dismiss on the issue of standing, subject matter jurisdiction can be addressed in the briefing on the merits." Reply to Petitioner's Response to Motion to Dismiss 1-2.

From the above-quoted language in intervenor's reply we understand intervenor to withdraw his first legal theory, for purposes of resolving the pending motion to dismiss. With that understanding, we decide intervenor's motion to dismiss, solely based on intervenor's contention that petitioners received "actual notice," within the meaning of ORS 197.830(3)(a), more than 21 days before they filed their notice of intent to appeal on January 16, 2016.

B. Actual Notice

For purposes of his standing challenge, we do not understand intervenor to dispute that ORS 197.830(3)(a) applies, that petitioners were "adversely affected" by the April 28, 2015 property line adjustment decision, or that notice of the April 28, 2015 property line adjustment decision was "required." The only question to be answered in resolving intervenor's standing challenge is whether petitioners filed their notice of intent to appeal "[w]ithin 21 days of actual notice" of the April 28, 2015 decision. ORS 197.830(3)(a). If not, the notice of intent to appeal was not timely filed and this appeal must be dismissed.

In *Frymark v. Tillamook County*, 45 Or LUBA 685, 697 (2003), we explained the distinction between the "actual notice" standard in ORS 197.830(3)(a) and the "knew or should have known" standard in ORS 197.830(3)(b):

> "Our dicta in *Willhoft* [*v. City of Gold Beach*, 38 Or LUBA 375 (2000)] essentially suggests that if the circumstances that would justify a conclusion that a party has subjective or imputed notice of a land use decision are strong enough, those facts may also justify a conclusion that a party received 'actual notice' of the decision, even though the local government did not provide 'actual notice,' assuming the words 'actual notice' were intended to require the written notice of decision that is legally required. We now conclude that that is precisely what those words mean. The species of notice that we described in *Willhoft* is 'quasi-actual notice,' and the circumstances that may give rise to such notice are as ill-defined as the term suggests. We now conclude that the 'actual notice' referred to in ORS 197.830(3)(a) is provided only when the local government provides the written notice of decision that is required by law. *When the local government fails to 'actual[ly]' provide the legally required written notice of decision, the 21-day deadline specified in ORS 197.830(3)(a) does not begin to run until the local government provides to that person (1) the legally required written notice of decision or (2) a copy of the decision itself.* Any other set of circumstances that would lead a reasonable person to know that the local government adopted a decision, or would be sufficient to impute such knowledge, will trigger the 21-day appeal period set out in ORS 197.830(3)(b) for persons who are not entitled to notice. But such circumstances will not trigger the 21-day deadline set out in ORS 197.830(3)(a) for persons who are entitled to actual notice of the decision." (Emphasis added; footnote omitted.)

The three forest template dwelling applications were approved on August 19, 2015. Reply to Petitioner's Response to Motion to Dismiss Exhibits A, B and C. Written notice of those forest template dwellings decisions was

mailed to the "BOWERMAN FAMILY LTD PTRSHP[.]" Reply to Petitioner's Response to Motion to Dismiss, Exhibit A Page 20, Exhibit B Page 42, Exhibit C Page 51. The notice of the forest template dwelling decisions included the decision and the supporting findings. Intervenor contends the following finding is included in all those notices:

> "1. Finding #1. The subject property must be a lawfully created parcel or lot. The information provided by the applicant and in the LMD file includes a copy of a legal lot verification for the subject property, Land Management Division file 509-PA 13-05036 *followed by property line adjustment, 509-PA15-05077*." Reply to Petitioner's Response to Motion to Dismiss, Exhibit A Page 13, Exhibit B Page 35, Exhibit C Page 56 (underlining in original, italics added).

Intervenor contends the reference to "property line adjustment, 509-PA15-05077" is a reference to the April 28, 2015 property line adjustment decision and is sufficient to constitute "actual notice" to petitioners of that property line adjustment decision, within the meaning of ORS 197.830(3)(a).

Only the notices at Exhibit B and C include the italicized reference to the property line adjustment decision; the notice at Exhibit A does not. But putting that issue aside, and putting aside the issue of whether actual notice to the "BOWERMAN FAMILY LTD PTRSHP" would be sufficient to give actual notice to both petitioner Bowerman Family LLC and petitioner McKenzie Bowerman, we do not agree the italicized language in the notices is sufficient to constitute "actual notice" of the April 28, 2015 property line adjustment decision. It may be that the reference in two of the three notices is sufficient to

qualify as what we described in *Frymark* as "quasi-actual notice" or inquiry notice. We need not and do not decide that question. But those brief references, included in what appear to be six-page notices of different decisions (the forest template decisions), simply are not "(1) the legally required written notice of decision or (2) a copy of the decision itself." *Frymark*, 45 Or LUBA 685, 697. Those references are not sufficient to constitute "actual notice" of the April 28, 2015 property line adjustment decisions, within the meaning of ORS 197.830(3)(a).

When petitioners filed their notice of intent to appeal on January 16, 2016, they had not yet been given actual notice of the April 28, 2015. Their notice of intent to appeal was therefore timely filed under ORS 197.830(3)(a). Therefore, intervenor's motion to dismiss is denied.

The record has already been transmitted. The petition for review shall be due 21 days from the date of this order. The response briefs shall be due 42 days from the date of this order. The Board's final opinion and order shall be due 77 days from the date of this order.

Dated this 17th day of May, 2016.

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Michael A. Holstun
Board Member