BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER ETTRO,
Petitioner,

vs.

CITY OF WARRENTON,
Respondent,

and

LORI LUM and LUM'S AUTO CENTER,
Intervenor-Respondents.

LUBA No. 2006-077

ORDER

This appeal concerns a city ordinance that changes the zoning map designation for intervenors' approximately 5-acre property from Residential (R-1) to Commercial (C-1). On December 20, 2005, the city sent written notice of a public hearing on the proposal before the planning commission. The planning commission held that public hearing on January 18, 2006. A second public hearing was held before the city council on February 28, 2006. The ordinance that rezones intervenors' property was adopted by the city council and became final on April 4, 2006. The city provided written notice of that decision to adjacent property owners on April 12, 2006, but did not send notice of its decision to petitioner.

Petitioner filed a notice of intent to appeal the city's April 4, 2006 decision, on May 1, 2006, 26 days after it became final. Petitioner claims to have first learned of the April 4, 2006 decision on April 27, 2006. Intervenors and respondent move to dismiss this appeal, alleging that the appeal was not timely filed. The parties apparently agree that if the deadline for filing the notice of intent to appeal is governed by ORS 197.830(9), the notice of intent to

appeal was not timely filed and this appeal must be dismissed.[1] The parties also apparently agree that if the deadline for filing the notice of intent to appeal is governed by ORS 197.830(3), this appeal is timely filed.[2] Although the city planning commission held a public hearing in this matter, and the city provided written notice of that hearing to adjoining property owners, it did not provide written notice of that hearing to petitioner. Petitioner contends he was legally entitled to written notice of the January 18, 2006 public hearing. Assuming petitioner is correct about his right to receive written notice of the January 18, 2006 public hearing, and applying the rationale expressed in our decision in *Leonard v. Union County*, 24 Or LUBA 362, 374-75 (1992), *overruled in part, Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 431-32, 899 P2d 720 (1995), the parties apparently agree that failure to provide notice of the public hearing would mean that the city did not provide the required public hearing for petitioner and ORS 197.830(3)(a) would establish the deadline for petitioner to file his notice of intent to appeal. Therefore, the critical question is whether petitioner was entitled to written notice of the public hearing in this matter. Under City of Warrenton Development Code (WDC) 4.1.6(C)(2)(a)(1), petitioner was entitled to written notice of that decision if he is one of the "property owners within 200 feet of the

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[1] As relevant, ORS 197.830(9) provides:

> "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. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615."

[2] As relevant, 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:
>
> "(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."

site." As framed by the parties' current arguments, the critical question is whether petitioner's property is within 200 feet of the rezoned property.

There are a number of assumptions that underlie the parties' shared position concerning the jurisdictional significance of the distance of petitioner's property from intervenors' property. For purposes of this order, we do not question any of those assumptions.

Along with their motion to dismiss, intervenors and respondent filed a Motion to Take Evidence Not in the Record under OAR 661-010-0045. Attached to that motion is an affidavit signed by Karl F. Foeste, a professional land surveyor (Foeste affidavit). Foeste claims to "have determined the minimum distance between the property subject to the zone change" and petitioner's property and that at the closest point, petitioner's property is 218.20 feet from intervenors' property.

On June 23, 2006, petitioner filed a motion requesting an extension of 28 days beyond the normal 14 days allowed by OAR 661-010-0065(2) to respond to motions to allow time for the surveyor he has engaged to measure the distance of petitioner's property from intervenors' property. Petitioner states that he does not oppose intervenors' motion to consider the extra-record affidavit attached to intervenors' and respondent's motion, but he argues that he "needs to respond with comparable evidence, *i.e.*, the report of a surveyor as to the distance between the two properties." Petitioner's Motion for Additional Time 1.

Intervenor faults petitioner for not securing the services of a surveyor more quickly, because petitioner knew or should have know that he was relying on ORS 197.830(3) and knew or should have known that he could only rely on that statute if his property is not more than 200 feet from intervenors property.

We only have to resolve one question at this point. Should we allow petitioner additional time to secure a survey to attempt to establish that his property is within 200 feet of intervenors' property? Although it is a close question, we conclude that we should. The

1 most compelling evidence concerning the distance between the two properties is the Foeste
2 affidavit. However, petitioner could be right that a second surveyor will show that Foeste's
3 measurement is in error. While it may be that petitioner could have taken steps to secure the
4 services of a surveyor more quickly, it appears that he made a reasonable effort to do so.
5 Petitioner will have until July 26, 2006 to secure a second survey and file his response to the
6 motion to dismiss.

7 However, we also agree with intervenor that given the current lack of *any* evidence
8 that petitioner's property is within the 200-foot notice area and the presence of significant
9 evidence that is not within the 200-foot notice area, this appeal should not be unreasonably
10 delayed by petitioner's request, if that delay is avoidable. Petitioner does not claim to have
11 attempted to measure the distance between the properties himself and has offered no reason
12 to dispute the representations in the Foeste affidavit. The maps that appears at pages 226 and
13 229 of the record, if accurate, seem to show that petitioner's property is more than 200 feet
14 from intervenors' property. [3] We therefore take the actions set out in the next paragraph, to
15 avoid any unnecessary delay in this appeal, in the event petitioner is able to establish that his
16 property is not more than 200 feet from intervenors' property.

17 Because petitioner does not oppose our consideration of the Foeste affidavit we grant
18 intervenors' and respondent's motion to consider extra record evidence. Because that motion
19 is no longer pending, it does not suspend the deadlines for future events under OAR 661-
20 010-045(9). If petitioner files a Motion to Take Evidence to request that we consider any
21 conclusions his surveyor may reach regarding the minimum distance between petitioner's
22 and intervenors' property, that motion will not automatically suspend the deadline for future

[3] The map at Record 229 has a scale and shows the measurements of intervening lots. We assume the rezoned property is the property that adjoins tax lot 2800 on its west side and that tax lot 2400 is petitioner's property. Although the numbers on our copy of the map are hard to read, they seem to show that the dimensions of the intervening tax lots 2800, 2501 and 2500 are such that the properties are more than 200 feet apart. Using the scale on the map, it also appears that petitioner's property is more than 200 feet from intervenors' property.

1 events under OAR 661-010-0045(9). We now rescind the part of our June 26, 2006 Order in
2 which we (1) suspended the deadline for filing the petition for review until the motion to
3 dismiss is resolved, and (2) advised the parties that we would resolve the pending motion to
4 dismiss before resolving the pending record objections. We will resolve the pending record
5 objections as quickly as possible after respondent and intervenors have responded to the
6 record objections. When the record is settled, we will establish a briefing schedule.
7 Petitioner's petition for review will be due 21 days after the record is settled.

8 Dated this 28th day of June, 2006.

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13 ______________________________
14 Michael A. Holstun
15 Board Member