

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

LINCOLN WOODS APARTMENTS,
THOMAS ANTHONY BARNES, THOMAS
ANTHONY BARNES AS TRUSTEE OF
THE THOMAS ANTHONY AND
LESLIE LEWIS BARNES AB LIVING TRUST,
THE ASHLEY INN & SUITES, JITESH DESAI,
and MKM HOTELS, LLC,
Petitioners,

vs.

CITY OF LINCOLN CITY,
Respondent.

LUBA No. 2020-011

FINAL OPINION
AND ORDER

Appeal from City of Lincoln City.

Byron Farley, Salem, represented petitioners.

Richard Appicello, Lincoln City, represented respondent.

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

ZAMUDIO, Board Member, did not participate in the decision.

DISMISSED

03/20/2020

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

1
2 NATURE OF DECISION

3 Petitioners appeal a city council decision approving a conditional use
4 permit (CUP) for a facility providing housing and supportive services for people
5 transitioning from homelessness.

6 **MOTION TO DISMISS**

7 The city moves to dismiss the appeal, arguing that petitioners failed to
8 appear in the proceedings below, failed to exhaust available administrative
9 remedies, and failed to file a timely appeal with LUBA. For the reasons set forth
10 below, we agree with the city that the appeal was not timely filed.

11 **A. Background**

12 The subject property (the property) is 0.68 acres in size and located
13 adjacent to Highway 101. The property is zoned General Commercial (GC) and
14 is improved with two buildings, an asphalt parking lot, a fence and mature
15 landscaping.

16 In October 2019, the city entered into an agreement to purchase the
17 property. The city’s purchase of the property was contingent on obtaining land
18 use approvals necessary to allow the city’s contemplated use of the property as
19 part of its efforts to address homelessness in the community. The city’s plan
20 contemplated use of the property by the non-profit “Helping Hands Reentry
21 Outreach Centers” (Helping Hands). Helping Hands provides a number of
22 services and programs, including providing individuals assistance with signing
23 up for health insurance, rental assistance, and food stamps, and obtaining official

1 documents such as birth certificates and social security cards. Helping Hands also
2 provides training on how to write a resume, interview well and budget for a
3 family. Under the city's plan, Helping Hands would provide housing and services
4 at the property.¹

5 The city's proposed use was not listed in the Lincoln City Code (LCC).
6 Emergency shelter is defined in the LCC.² The city applied for a planning director
7 interpretation of whether the proposed facility was similar to an Emergency

¹ As explained in the application:

“The west building will be the housing for men and a few families, and the east building will be the housing for women and a few families. Each residence will contain bedrooms, bathrooms, a kitchen, a living room, and a laundry room. The west building will also contain an office for the facility manager, case manager, and crisis manager. The facility manager lives at the site. There is also a resident assistant in each building 24 hours a day, seven days a week. The crisis manager and case manager are at the site Monday through Friday, 8 to 5.

“There are strict guidelines for residents. They have to be clean and sober, actively employed, provide at least ten hours of volunteer service to the community, and attend self-improvement meetings and addition meetings.” Record 71.

² As defined in the Lincoln City Code (LCC):

“‘Emergency shelter’ means a facility consisting of dwelling units, dormitories and/or yurts which provides necessary counseling services for 50 or fewer homeless persons for a period not to exceed 180 days per person and which includes associated cooking and sanitation facilities necessary to accommodate the maximum occupancy of the facility.” LCC 17.08.010.

1 Shelter and like an Emergency Shelter, conditionally allowed in the GC zone. On
2 October 21, 2019, the planning director issued a decision that the Helping Hands
3 facility was similar to an Emergency Shelter and therefore conditionally allowed
4 in the GC zone. Record 18.

5 On October 21, 2019, and October 24, 2019, notice of the planning
6 director's decision was sent to owners of property within 250 feet of the subject
7 property. Record 18. Petitioners were among the property owners to whom the
8 city sent notice of the planning director decision.³ Record 60-61. The planning
9 director's decision was not appealed.

10 Based upon the planning director's interpretation decision, on November
11 7, 2019, the city applied for a CUP to operate the Helping Hands facility. Record
12 68. On November 12, 2019, the city mailed owners of property within 250 feet

³ LCC 17.76.040(A) provides:

“A decision of the planning director on the issuance of an administrative permit or discretionary action concerning a land use matter may be appealed to the planning commission by an affected party entitled to notice of decision by filing an appeal with the planning and community development director within 12 days of the mailing of the decision. The notice of appeal that is filed with the city shall indicate the decision that is being appealed and the basis for the appeal. The notice shall indicate in what respects the decision being appealed is a discretionary decision involving a land use matter. The matter at issue will be a determination of the appropriateness of the director's interpretation of the requirements of this title. Notice of the hearing shall be mailed as provided in [LCC] 17.76.020(B)(1).”

1 of the subject property notice that the city would consider the CUP application at
2 a planning commission hearing on December 3, 2019. Record 60. The city sent
3 petitioners notice of the upcoming CUP hearing. Record 61. Petitioners did not
4 participate in the proceedings.

5 On December 3 and December 17, 2019, the planning commission held a
6 hearing and adopted a decision approving the CUP for “transitional housing” on
7 the subject property. Record 16. The CUP approval acknowledges (1) that the
8 LCC does not define “transitional housing” and (2) relies on the planning director
9 decision for the finding that transitional housing is conditionally allowed in the
10 GC zone. The CUP approval also describes a proposed definition of transitional
11 housing that the city could adopt in the future. At the same December 2019
12 meeting at which the planning commission considered the CUP, the planning
13 commission also considered whether to recommend that the city council adopt
14 LCC text amendments defining transitional housing and adding transitional
15 housing to the list of conditionally allowed uses in the GC zone. The planning
16 commission decision approving the CUP did not, however, rely on the proposed
17 zoning code text amendment, but rather relied upon the prior October 2019
18 director’s interpretation.

19 On December 23, 2019, the city mailed the planning commission’s
20 decision to those who participated before the planning commission. The LCC
21 provides that a decision becomes final for purpose of appeal on the date the city

1 mails the decision.⁴ The planning commission decision was not appealed to the
2 city council.

3 The January 13, 2020 city council meeting agenda listed council
4 deliberation on a resolution authorizing the sale of real property for purposes of
5 transitional housing. Response to Motion to Dismiss, Exhibit B, page 1. The city
6 council agenda also provided a time for a public hearing on text amendments to
7 the LCC to (1) add a definition for “transitional housing,” and (2) add transitional
8 housing to the list of conditional uses in the GC zone. Response, Exhibit B, page
9 2. Petitioners appeared at the January 13, 2020 city council meeting. Prior to the
10 start of the city council meeting, petitioners’ counsel submitted a letter arguing
11 in part that the proposed definition of transitional housing might conflict with
12 state law. The city council then cancelled the public hearing on the LCC text
13 amendments, and did not accept testimony from petitioners regarding that agenda
14 item. The city council approved Resolution 2020-02, authorizing conveyance of
15 the subject property to Helping Hands, during the regular meeting.

⁴ LCC 17.76.040(B) provides:

“A decision of the planning commission concerning a quasi-judicial land use matter may be appealed to the city council by a party to the hearing by filing an appeal within 10 calendar days of the mailing of the order. The notice of appeal filed with the city shall contain the information outlined in subsection (C) of this section. For purposes of this section, ‘party’ refers to the applicant and any person who appeared orally or in writing at the hearing.”

1 On January 30, 2020, petitioners filed their notice of intent to appeal the
2 planning commission’s CUP decision. The city filed a motion to dismiss the
3 appeal as untimely. The city also asserts that petitioners failed to exhaust local
4 administrative remedies and did not appear below.

5 **B. ORS 197.830(9) and ORS 197.830(3)**

6 ORS 197.830(9) provides in part, “A notice of intent to appeal a land use
7 decision or limited land use decision shall be filed not later than 21 days after the
8 date the decision sought to be reviewed becomes final.” The planning
9 commission decision became final on December 23, 2019. LCC 17.76.040(B).
10 Petitioners’ notice of intent to appeal to LUBA was filed on January 30, 2020,
11 more than 21 days after the CUP decision became final.

12 Petitioners argue that their appeal is nonetheless timely pursuant to ORS
13 197.830(3). ORS 197.830(3) provides:

14 “If a local government makes a land use decision without providing
15 a hearing, except as provided under ORS 215.416 (11) or 227.175
16 (10), *or the local government makes a land use decision that is*
17 *different from the proposal described in the notice of hearing to such*
18 *a degree that the notice of the proposed action did not reasonably*
19 *describe the local government’s final actions, a person adversely*
20 *affected by the decision may appeal the decision to the board under*
21 *this section:*

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

24 “(b) Within 21 days of the date a person knew or should
25 have known of the decision where no notice is
26 required.” (Emphasis added.)

1 Petitioners argue that the city’s November 12, 2019 notice of the planning
2 commission hearing on the proposed CUP did not reasonably describe the local
3 government’s final action, and petitioners filed their appeal within 21 days of
4 learning that the notice did not accurately describe the project approved by the
5 planning commission. Response 5-6; Record 56, 60. For the reasons explained
6 below, we reject petitioners’ arguments.

7 ORS 197.830(3) applies in cases in which a party receives inadequate
8 notice of a hearing that he or she is entitled to receive under statute. *Aleali v. City*
9 *of Sherwood*, 262 Or App 59, 325 P3d 747 (2014) (a petitioner entitled to notice
10 of a hearing under local ordinance but not under ORS 197.763(2)(a)(A) may not
11 rely on ORS 197.830(3) to file a late appeal). In *Phillips v. City of Corvallis*, 75
12 Or LUBA 315 (2017), petitioner filed her appeal at LUBA 20 months after the
13 challenged decision became final, long after a planning commission hearing and
14 decision on the subject zone change, subdivision and variance application. She
15 argued that her appeal was timely because the notice of planning commission
16 hearing she received “did not reasonably describe the local government’s final
17 actions.” *Id.* at 321. We held that even if the notice did not reasonably describe
18 the city’s final decision, the petitioner’s appeal was untimely because she was
19 not entitled to notice of the hearing by statute, and therefore ORS 197.830(3) was
20 not applicable.

21 Petitioners may not rely on ORS 197.830(3) where the notice provided was
22 not required by state law. ORS 197.763(2)(a)(A) provides that notices of quasi-

1 judicial hearings must be provided to owners of property within 100 feet of the
2 property which is the subject of the notice, where the subject property is wholly
3 or in part within an urban growth boundary. Petitioners state in their response to
4 the motion to dismiss that they own property within 250 feet of the subject
5 property. Response 12. Petitioners do not argue or attempt to establish that they
6 were entitled by statute to notice of the December 2019 planning commission
7 hearing. Petitioners may not rely upon ORS 197.830(3).

8 We also reject petitioners' arguments for a second reason. Even if
9 petitioners were entitled to notice of the hearing by statute and ORS 197.830(3)
10 applied, we agree with the city that the city's notice of the planning commission
11 hearing reasonably described the city's final action. We have held that an
12 assertion that a description in a notice is inadequate must explain how the notice
13 misled the recipient. In *Bigley v. City of Portland*, 168 Or App 508, 4 P3d 741
14 (2000), the city hearings officer approved amendments to the Oregon Zoo Master
15 Plan. The city's notice of its public hearing identified 23 separate projects and
16 improvements described in the zoo master plan amendment application.
17 Conversion of an existing 129-space temporary parking lot to a *permanent* lot
18 was not among the listed projects and improvements. Petitioners did not appear
19 before the hearings officer or receive notice of the hearings officer's decision, the
20 appeal of the hearings officer's decision to the city council, or the city council's
21 decision on the appeal. Petitioners filed their appeal at LUBA almost two years
22 after the city council's decision. The respondents moved for dismissal of the

1 LUBA appeal as untimely. Petitioners argued that the notice of the hearing did
2 not advise petitioners that the existing temporary parking lot component was
3 proposed to become permanent. LUBA agreed, and dismissed the appeal. *Bigley*
4 *v. City of Portland*, 37 Or LUBA 544 (2000). However, the court of appeals
5 agreed with petitioners that the failure of the notice to identify the parking lot
6 component of the proposal rendered the notice inadequate. 168 Or App 508.

7 Unlike the facts in *Bigley*, there is nothing in the notice of hearing that
8 petitioners have identified that petitioners maintain the notice failed to identify.⁵
9 The city’s notice of the December 3, 2019 planning commission hearing provides
10 the following under the heading “Description of Project”:

11 “CUP 2019-04 is an application to operate a transitional housing
12 facility. The project site is 3454 NE Highway 101 * * * in the
13 General Commercial (GC) zone. * * *” Record 56, 60.

14 The final decision describes the planning commission’s decision to approve a
15 conditional use permit for a transitional housing facility. Record 16. The notice
16 of the hearing adequately described the use ultimately approved by the planning
17 commission.

⁵ We also note, again, that the city provided petitioners with a copy of the planning director’s decision that the proposed facility could be allowed as a conditional use in the GC zone, prior to the CUP application being filed and in advance of the CUP proceeding. It is at least questionable that petitioners were surprised by the components of the proposed facility.

1 Petitioners argue that the actions of the city council at its January 13, 2020
2 meeting that (1) deleted all references to “transitional housing” in its resolution
3 authorizing conveyance of the subject property to Helping Hands, and (2)
4 rejected consideration of proposed LCC text amendments, “essentially concedes”
5 that the term “transitional housing” could not have adequately described the use
6 approved by the planning commission. Response 5, 8 That argument does not
7 explain why the notice that the city sent to petitioners on November 12, 2019,
8 that notified petitioners that the planning commission would consider a CUP
9 application for transitional housing at its December 3, 2019 meeting, did not
10 reasonably describe the planning commission’s final action to approve a CUP
11 application for transitional housing.

12 In *Broderson v. City of Ashland*, 62 Or LUBA 471, 479 (2010) we
13 observed that, “Petitioner identifie[d] nothing in any of the city *notices* that
14 misled her about the nature or scope of the ordinance and resulted in her failure
15 to appear and participate in the city hearings.” (Emphasis in original.) Similarly,
16 petitioners identify nothing in the notice of planning commission hearing that
17 misled petitioners about the nature of the application the planning commission
18 was considering. The city’s notice of the CUP hearing stated that the application
19 would be reviewed against the General Commercial zone and Conditional Use
20 provisions in the LCC. Record 60.

21 Moreover, to the extent that petitioners argue that the city’s notice of a
22 planning commission and city council hearing on proposed text amendments to

1 the LCC that was sent to petitioners on November 12, 2019, misled them, we
2 reject that argument. The relevant question under ORS 197.830(3) is whether the
3 city's notice of the planning commission hearing on the CUP application misled
4 them, not whether a different notice of a different local proceeding on a different,
5 legislative land use action misled them.

6 Petitioners did not file their appeal within 21 days of the date the city's
7 decision became final. Accordingly, their appeal is untimely under ORS
8 197.830(9).

9 The appeal is dismissed.