BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEVIN OIL CO., INC.,
Petitioner,

vs.

MORROW COUNTY,
Respondent,

and

LOVE'S TRAVEL STOPS
AND COUNTRY STORES, INC.,
Intervenor-Respondent.

LUBA No. 2015-023

FINAL OPINION
AND ORDER

Appeal from Morrow County.

E. Michael Connors, Portland, represented petitioner.

James W. Nelson, County Counsel, Heppner, represented respondent.

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

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

HOLSTUN, Board Member, dissenting.

DISMISSED 08/04/2015

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county extending a previously approved site plan.

MOTION TO INTERVENE

Love's Travel Stops and County Stores, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. No party opposes the motion and it is granted.

FACTS

In January, 2014, the county approved intervenor's application for site plan review for a travel center. That approval was appealed to LUBA in LUBA No. 2014-012, and affirmed. *Devin Oil v. Morrow County*, __ Or LUBA __ (LUBA Nos. 2013-110, 2014-010/011/012, December 9, 2014).[1] In January 2015, the county planning director approved a 12-month extension of the site plan review approval (Extension Decision). The Extension Decision was made without a public hearing, and without notice to any persons other than intervenor. On April 21, 2015, petitioner filed a notice of intent to appeal the Extension Decision.

[1] The site plan review decision that was challenged and affirmed in LUBA Nos. 2014-010/012 was a decision approving the site plan and a zoning permit. MCZO 1.030 defines "zoning permit" as "[a]n authorization issued prior to a building permit, or commencement of a use subject to administrative review, stating that the proposed use is in accordance with the requirements of the corresponding land use zone."

JURISDICTION

A. The Extension Decision is a Land Use Decision

The county and intervenor (together, respondents) move to dismiss the appeal, arguing first that the Extension Decision falls within the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(A) for a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]" Respondents rely on Morrow County Zoning Ordinance (MCZO) 1.050 to argue that the provision allows the planning director to grant a 12-month extension:

> "Prior to the construction, reconstruction, alteration, or change of use of any structure larger than 100 square feet or use for which a zoning permit is required, a zoning permit for such construction, reconstruction, alteration, or change of use or uses shall be obtained from the Planning Director or authorized agent thereof. A zoning permit shall become void after 1 year unless the development action has commenced. A 12-month extension may be granted when submitted to the Planning Department prior to the expiration of the approval period."

Petitioner responds by citing MCZO 4.165(C), which provides that for site plan review approval:

> "Site Plan Review shall be required for all land use actions requiring a Zoning Permit as defined in Section 1.050 of this Ordinance. The approval shall lapse, and a new application shall be required, if a building permit has not been issued within one year of Site Review approval, or if development of the site is in violation of the approved plan or other applicable codes."

Petitioner argues that the planning director was required to interpret all of the potentially applicable provisions of the MCZO and exercise legal judgment in determining that MCZO 1.050, rather than MCZO 4.165(C), applied to

intervenor's request to extend the site plan review approval and zoning permit.[2] *See* n 1. We agree with petitioner. *See St. Johns v. Yachats Planning Commission*, 138 Or App 43, 47, 906 P2d 304 (1995) (the city's determination of which ordinance applied to proposed development requires interpretation and exercise of legal judgment, is not determinable under clear and objective standards and is thus a land use decision subject to LUBA's exclusive jurisdiction). Arguably, MCZO 1.050 authorizes the county to extend only the zoning permit, and does not authorize the county to extend the site plan review approval. MCZO 4.165(C), which is specific to site plan review approvals, does not mention or expressly authorize extensions. We conclude that a decision to extend the site plan review approval necessarily required interpretation and the exercise of legal judgment, and therefore does not fall within the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(A).

B. Standing

Respondents challenge petitioner's standing to appeal the extension decision. The parties appear to agree that standing to appeal the county's decision is governed by ORS 197.830(3), which generally applies to certain decisions that are made without a hearing, and thus without a local proceeding at which the petitioner could appear and establish standing under ORS 197.830(2).

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[2] Petitioner and intervenor each filed numerous pleadings related to the motion to dismiss. Although our rules neither provide for nor prohibit filing replies and surreplies and surresponses, and LUBA is not obligated to consider such replies, surreplies and surresponses, LUBA will consider them where appropriate and where doing so does not unduly delay the review proceeding. *Cedar Mill Creek Corr. Comm. v. Washington County*, 37 Or LUBA 1011, 1017 (2000). We have accepted and considered all pleadings.

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:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required." (Emphasis added.)

The requirement that a person who appeals a decision of a local government demonstrate that the person is "adversely affected" by the decision has been, in various forms, a part of the statutes governing appeals to LUBA since LUBA was created in 1979.[3] When LUBA was first created, Oregon

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[3] Oregon Laws 1979, chapter 772, section 4 provided:

> "(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or who is aggrieved by a land use decision and who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of that decision * * *.
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> "(3) Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of a quasi-judicial land use decision if the person:
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> "(a) Appeared before the city, county or special district governing body or state agency orally or in writing; and
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> "(b) Was a person entitled as of right to notice and hearing prior to the decision to be reviewed or was a person whose interests are adversely affected or who was aggrieved by the decision."

Laws 1979, chapter 772, section 4(3) provided in part that for a person to have standing to appeal a quasi-judicial land use decision to LUBA, that person must be "a person entitled as of right to notice and hearing prior to the decision to be reviewed or a person whose interests were adversely affected or who was aggrieved by the decision." Between 1981 and 1984 there were three appeals of LUBA decisions that addressed a number of questions regarding standing to appeal land use decisions to the newly formed Land Use Board of Appeals, and all of those appeals resulted in decisions by the Court of Appeals and Supreme Court. *Friends of Benton County v. Benton County*, 3 Or LUBA 165 (1981), *aff'd, Benton County v. Friends of Benton County*, 56 Or App 567, 642 P2d 358, *aff'd*, 294 Or 79, 653 P2d 1249 (1982); *Jefferson Landfill v. Marion County*, 6 Or LUBA 1 (1982), *aff'd, Jefferson Landfill Comm. v. Marion County*, 65 Or App 319, 671 P2d 763 (1983), *rev'd and remanded*, 297 Or 280, 686 P2d 310 (1984); *Warren v. Lane County*, 6 Or LUBA 47 (1982), *aff'd* 62 Or App 682, 662 P2d 755, *on reconsideration*, 66 Or App 7, 672 P2d 1213 (1983), *rev'd and remanded*, 297 Or 290, 686 P2d 316 (1984). In all three of the Supreme Court opinions cited above, the Supreme Court concluded that one or more of the petitioners seeking LUBA review were "aggrieved" within the meaning of the then-applicable statute. Because in each case the Supreme Court concluded that the petitioners were "aggrieved," the Court did not need to and did not address the question of whether the petitioners were, in the alternative, "adversely affected."

One of the Supreme Court opinions cited above discusses the meaning of the phrase "adversely affected" in the then-applicable statute. *Jefferson Landfill v. Marion County*, 297 Or 280, 686 P2d 310 (1984). In *Jefferson*

Landfill the Supreme Court explained that the phrase "whose interests are adversely affected * * *" means:

> "'[A]dversely affected' means that a local land use decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner. Examples of adverse affects would be noise, odors, increased traffic or potential flooding. *See, e.g., Yamhill County v. Ludwick*, 294 Or 778, 663 P2d 398 (1983) and *Benton County v. Friends of Benton County*, [294 Or 79, 653 P2d 1249 (1982)]." 297 Or at 283.

The legislature undertook comprehensive amendments to LUBA's standing statutes in 1989, and the ORS 197.830(3) "adversely affected" requirement was enacted by the legislature in its present form in 1989. Or Laws 1989, ch 761, § 12. As relevant here, in order to appeal a decision made without a hearing, a person must show that he timely appealed the decision within the deadlines set out in ORS 197.830(3)(a) or (b) *and* that he is "adversely affected" by the decision.

Respondents argue that petitioner has not demonstrated and cannot demonstrate that it is "adversely affected" by the Extension Decision, within the meaning of ORS 197.830(3). For the reasons that follow, we agree with respondents that petitioner is not a "person adversely affected by the decision" under ORS 197.830(3).

As noted, the decision approves a 12-month extension of a previous site plan and zoning permit approval that allows intervenor to develop a travel center on its property located in the county. Petitioner owns two service stations at I-84 Exit 164, and several commercial fuel "cardlock" stations located in the city of Boardman, all of which are approximately 5 miles away from the proposed travel center to be located in the county, on the south side of

I-84 at Exit 159. Response to Motion to Dismiss 8. Petitioner argues that it is "adversely affected" by the Extension Decision because the decision to extend the site plan approval will cause petitioner to lose revenue, customers, and employees to the new travel center, and pay increased fuel costs.[4] Response to Motion to Dismiss 8. Petitioner attaches to its response the affidavit of a business consultant, stating his professional opinion that the competition and loss of market share caused by the proposed travel center will adversely affect petitioner's business.

Respondents argue that petitioner has failed to demonstrate that it is adversely affected by the Extension Decision because the adverse impacts that petitioner alleges will result from the Extension Decision are negative economic impacts to its business that currently operates on several properties located in the city of Boardman, approximately five miles from intervenor's property. According to respondents, petitioner has not established any causal relationship between the alleged impacts from development of a travel center on intervenor's property to other *property owned or used* by the petitioner, but rather has alleged only economic impacts to petitioner as a business operator.

Petitioner relies on *Whitesides Hardware, Inc. v. City of Corvallis*, 9 Or LUBA 24 (1983), to argue that economic or business impacts are adverse effects within the meaning of ORS 197.830(3). *Whitesides* involved an appeal under the former version of ORS 197.830(3) of a city ordinance approving a comprehensive plan amendment and zone change to redesignate and rezone a 46-acre site located outside of the downtown area to allow a large-scale,

[4] Petitioner claims it will be required to pay increased fuel costs because the cost of fuel to petitioner depends on the volume of fuel sold and that cost increases as the volume of fuel sold decreases.

regional shopping center. In *Whitesides*, the petitioner owned a commercial building and retail business located in the downtown area. The applicable version of ORS 197.830(3) allowed standing for persons either "adversely affected or aggrieved" by the decision. In *Whitesides*, we held that the petitioner had standing to appeal the decision because the petitioner alleged both "a reduction in the quality of downtown Corvallis for commercial land uses and retail activities[,]" as well as a disruption of the petitioner's business. Id. at 28. The petitioner cited language from the city's comprehensive plan estimating that a regional shopping center outside the downtown area would eliminate 40 percent of the commercial uses in the downtown core. The petitioner in *Whitesides* did not merely allege harm to its economic or business interests, but rather alleged harm to the vitality of the city's downtown commercial core, in which the petitioner had a direct interest as a property owner. In other words, the petitioner did not merely allege harm to his particular business interests from a retail competitor, as in the present case, but also alleged adverse impacts to the present and future use of his property, for any commercial use. *Whitesides* does not support petitioner's broad claim that pure economic impacts to the petitioner's business from allowing a competing business to establish itself are sufficient to establish "adverse effects" under ORS 197.830(3).

We recently considered a similar challenge to a party's jurisdiction under ORS 197.830(3) to appeal a decision made without a hearing in *Schnitzer Steel Indus. v. City of Eugene*, 67 Or LUBA 444 (2013). In *Schnitzer Steel*, the petitioner appealed a decision made without a hearing and argued that it was "adversely affected" by the decision because the applicant's metal shredding operation would compete with and have negative economic consequences on

the petitioner's metal shredding business operations, located in Portland approximately 100 miles away. To ascertain the legislature's intended meaning in the phrase "adversely affected" as used in the current version of ORS 197.830(3) enacted in 1989, we looked to the Supreme Court's 1984 decision in *Jefferson Landfill Committee v. Marion County*. Although the Supreme Court in *Jefferson Landfill* interpreted the phrase "adversely affected" in the context of a previous version of the statutes governing appeals to LUBA, when the legislature enacted the current version of ORS 197.830(3) in 1989, it presumably was aware of the Supreme Court's interpretation in *Jefferson Landfill* of the legislature's intent in the phrase "adversely affected," and there is no evidence in the legislative history that the legislature intended to depart from that interpretation.

In *Ludwick* and *Benton County*, both of which were cited in *Jefferson Landfill* to support the Supreme Court's interpretation of the phrase "adversely affected," the petitioners demonstrated that their properties were located within reasonably close proximity of the proposed developments and that their properties would be negatively impacted by the proposed developments, through increased traffic on a shared road (*Ludwick*) and the increased likelihood of flooding on property two miles downstream from a proposed gravel operation (*Benton County*). In *Jefferson Landfill*, to illustrate and support its interpretation of the phrase "adversely affected," the Court listed examples of "adverse affects" - "noise, odors, increased traffic or potential flooding." 297 Or at 283. Those examples all share a common feature in that they are physical impacts on property that can result from development approved under the challenged decision.

Arguably, the examples of adverse effects described in *Ludwick* and *Benton County* could be examples only of those that "impinge[] upon the petitioner's use and enjoyment of his or her property * * *," or they could include those described by the Court as those that "otherwise detract[] from interests personal to the petitioner." *Jefferson Landfill*, 297 Or at 283. However, in *Schnitzer Steel* we concluded, based on the "examples" of adverse effects listed by the Supreme Court, that *Jefferson Landfill*'s description of "interests personal to the petitioner" does not include purely economic interests:

> "The factual circumstances of *Ludwick* and *Benton County*, in which the petitioners demonstrated a locational and causal link between physical effects from the proposed developments and their properties, and the examples of 'adverse effects' given by the Court in *Jefferson Landfill* support a conclusion that the phrase 'interests personal to the petitioner' used in Jefferson Landfill does not include purely economic effects on a business competitor that will suffer no physical effects from the proposed use of the subject property by virtue of the location of its business more than a hundred miles from the subject property." *Schnitzer Steel*, 67 or LUBA at 450.

We conclude that petitioner has failed to establish that it is "adversely affected" within the meaning of ORS 197.830(3). Petitioner does not allege any adverse physical effect to its properties from the county's decision to extend the site plan review approval. The only adverse effect petitioner alleges is economic harm to petitioner as a business operator from intervenor's business operations that petitioner argues include lower fuel prices than petitioner's stations, and aggressive marketing and pricing practices. Response to Motion to Dismiss 8-9; Exhibit I. Such allegations do not amount to a sufficient pleading of "adverse effect" within the meaning of ORS 197.830(3).

Petitioner also argues that it is "adversely affected" by the Extension Decision because of its "extensive involvement" in the county's original decision to approve intervenor's site plan. Response to Motion to Dismiss 11. However, petitioner does not dispute that the Extension Decision is a different decision than the 2014 site plan review approval decision. The statutes that confer standing to appeal to LUBA require a petitioner to establish that it has standing to appeal each decision that is made by a local government. The fact that a party may have appeared before the local government in a separate proceeding on a different application does not establish that that party is "adversely affected," within the meaning of ORS 197.830(3), by a different, albeit related, decision on a different application.

Finally, petitioner argues that it is "adversely affected" by the Extension Decision because it requested notice of any decision involving intervenor's proposed development, and was therefore entitled to notice of the decision under MCZO 9.050(K).[5] Petitioner's Surreply to Motion to Dismiss 7-8.

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[5] MCZO 9.050(K) is included within a section of the MCZO entitled "Public Hearings" and provides:

> "Notice of Decision. The County shall send, by first class mail, a notice of all decisions rendered under this Ordinance to all persons with standing, i.e., the applicant, all others who participated either orally or in writing before the close of the public record *and those who specifically requested notice of the decision*. The notice of decision shall include the following information:
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> "1. The file number and date of decision;
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> "2. The name of the applicant, owner and appellant (if different);

Respondents dispute that petitioner was entitled to notice of the decision under MCZO 9.050(K). However, we need not resolve that issue, because we disagree with petitioner that a party is conclusively "adversely affected" by a decision, within the meaning of ORS 197.830(3), solely because it requests notice of the decision under the notice provisions of the local government's code. The 1989 changes to ORS 197.830 eliminated language that was in *former* ORS 197.830(3) that allowed a party to establish standing to appeal a quasi-judicial land use decision to LUBA if the party could establish that it appeared before the local government and that it was either (1) entitled to notice of the decision; or (2) aggrieved by the decision; or (3) adversely affected by the decision, and retained only the requirement that a party must establish that it is "adversely affected" by the decision. *See* n 3. The legislature could have chosen to continue to allow a party to establish standing by establishing that it was entitled to notice of the decision, but it did not. Moreover, nothing in the language of ORS 197.830(3) supports a conclusion that a party who is entitled to notice of the decision and who does not receive notice is thereby "adversely affected" by the decision.

> "3. The street address or other easily understood location of the subject property;
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> "4. A brief summary of the decision, and if an approval, a description of the permit authorized or approval granted;
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> "5. A statement that the decision is final unless appealed, and description of the requirements for perfecting an appeal;
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> "6. The contact person, address and a telephone number whereby a copy of the final decision may be inspected or copies obtained." (Emphasis added.)

The appeal is dismissed.

Holstun, Board Member, Dissenting.

I am not sure why a person with a business that will suffer significant economic harm if another business is located nearby could not be "adversely affected" by a decision that grants land use approval for that competing business, within the meaning of ORS 197.830(3), whereas a similarly placed person who is offended by noise or odors that the use will produce could be adversely affected.[6] But I concede that our decision in *Schnitzer Steel* does seem to introduce a requirement that a person seeking standing under ORS 197.830(3) must demonstrate it will suffer some "physical effects" and therefore may not allege "purely economic effects" as a basis for standing under ORS 197.830(3). 67 Or LUBA at 450.

I think the facts in *Schnitzer Steel* were particularly important, and it was important in *Schnitzer Steel* that the petitioner's property in Portland was located 100 miles away from the disputed site in Eugene. That is not the case here. Petitioner's service stations are located at I-84 interchange 164, which is approximately five miles east from intervenor's proposed travel center at interchange 159. Given the limited access nature of the freeway, they are effectively adjoining businesses that compete for the same refueling and accessory retail sales customers. To put it simply, fewer eastbound cars are going to stop at one of petitioner's stations at interchange 164 after petitioner's facility is constructed at interchange 159. I think petitioner has adequately pled

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[6] This of course does not mean the adversely affected business has a right to exclude competition. I only question why such a business, without more, should not have standing to present its case to LUBA on the merits, as does the property owner who is offended by noise or odors.

a physical impact, i.e., the applicant's fuel center will capture a large share of the same eastbound auto and truck traffic that petitioner depends on for its business. In my view, that is a proximate physical impact and sufficient to demonstrate "adverse effect," within the meaning of ORS 197.830(3). Moreover, in Jefferson Landfill, the Court listed "noise, odors, increased traffic or potential flooding" as examples of "adverse affects." 297 Or at 283. If someone who does not like traffic can be "adversely affected" by "increased traffic," I do not see why someone whose property is improved with a business that depends on attracting traffic cannot claim to be adversely affected, within the meaning of ORS 197.830(3), by an action that will decrease traffic. Again, petitioner does not have the right to exclude competition, but in my view it does have standing under ORS 197.830(3) to present its land use arguments on the merits.

I respectfully dissent.