BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEAN E. SHRADER, RICHARD L. SHRADER,
TIMOTHY L. BENESH and REBECCA M. BENESH,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

EAGLE CREST, INC.,
Intervenor-Respondent.

LUBA No. 2000-047

ORDER

Intervenor-respondent moves to dismiss petitioners' appeal of the county's approval of a conditional use permit for a destination resort conceptual master plan.

MOTION TO INTERVENE

Eagle Crest, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. There is no objection to the motion and it is allowed.

MOTION TO DISMISS

A. Introduction

On July 2, 1999, intervenor submitted an application to the county for approval of a conditional use permit for a destination resort conceptual master plan to allow expansion of its existing destination resort. Intervenor proposes to expand the destination resort to a 480-acre parcel zoned exclusive farm use (EFU) that is almost entirely surrounded by land owned by the federal Bureau of Land Management (BLM), which is also zoned EFU. Intervenor's proposed expansion includes the construction of two access roads across the BLM land to existing public roads, and the access roads are required in the county's decision as a

condition of approval. One of the proposed access roads would run from the 480-acre EFU-zoned parcel north through the BLM land to state Highway 126. Although petitioners' properties are more than 500 feet from the 480-acre EFU-zoned parcel, the proposed access road to Highway 126 passes within 100 feet of petitioners' properties.

The county sent notice of the public hearing regarding intervenor's application to property owners within 500 feet of the 480-acre EFU-zoned parcel, but not to property owners within 500 feet of the proposed access road. A hearing was held on September 14, 1999, and the application was approved on December 2, 1999. On December 13, 1999, intervenor filed a request for reconsideration regarding certain conditions of approval. The county again sent notices to property owners within 500 feet of the 480-acre EFU-zoned parcel but not to petitioners. The hearings officer issued a decision on January 6, 2000, which became final under county land use regulations on January 18, 2000. Intervenor subsequently obtained a right-of-way permit to construct a road improved to county local road standards across the EFU-zoned BLM parcel within 100 feet of petitioners' properties. Intervenor obtained the right-of-way pursuant to the applicable federal requirements, which did not include individual written notice to petitioners.

Petitioners assert that they learned of the county's decision on March 21 and 23, 2000.[1] Petitioners appealed the county's decision directly to LUBA on April 11, 2000. Intervenor moves to dismiss this appeal as untimely filed.[2]

B. Timeliness of Appeal

A notice of intent to appeal must be filed with LUBA no later than 21 days after the date the decision sought to be reviewed becomes final. ORS 197.830(9). Petitioners did not

---

[1] Petitioners Jean and Richard Shrader assert that they learned of the county's decision on March 21, 2000, and petitioners Timothy and Rebecca Benesh assert that they learned of the decision on March 23, 2000.

[2] Intervenor also moved to dismiss the appeal on the basis that federal preemption bars petitioners from challenging at LUBA the BLM decision to allow a right-of-way across federal land. However, petitioners explain that they are only challenging the county's decision, not the BLM decision allowing the right-of-way.

file their appeal until more than 21 days after the decision became final. ORS 197.830(3) through (5) provide exceptions to ORS 197.830(9). ORS 197.830(3) provides, in pertinent part:

> "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."

The "without providing a hearing" language of ORS 197.830(3) also includes circumstances where a local government fails to give a person the notice of a hearing they were entitled to receive under state law. *Leonard v. Union County*, 24 Or LUBA 362, 374 (1992).[3] Petitioners contend that the provisions of ORS 197.830(3) apply because the challenged decision was made "without a hearing" as to petitioners because they were not provided with the notice of the hearing to which they were entitled under statute. ORS 197.763(2)(a) provides:

> "Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:
>
> "* * * * *
>
> "(C) Within 500 feet of the property which is the *subject of the notice* where the *subject property* is within a farm or forest zone." (Emphases added.)

The parties do not dispute that petitioners' properties are located more than 500 feet from the 480-acre EFU parcel but less than 500 feet from the EFU-zoned BLM parcel and the proposed access road, and that petitioners were not provided notice of the hearing. If petitioners were entitled to notice under ORS 197.763(2)(a)(C), then their appeal was timely

[3] In *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995), the Court of Appeals overturned our holding in *Leonard* that *local* notice requirements can toll the 21-day appeal period. However, the tolling provisions of ORS 197.830(3) are not affected by the court's decision in *Orenco Neighborhood*.

filed under ORS 197.830(3).[4] The dispositive issue is whether the portion of the BLM parcel where the proposed access road will be located constitutes part of the "subject property" and therefore is property which is the "subject of the notice" under ORS 197.763(2)(a)(C).

Intervenor argues that federal preemption prevents the county from applying or enforcing any local land use regulations on federal land. According to intervenor, the BLM property on which the access road will be located cannot be characterized as property which is the "subject of the notice" because the county is precluded from enforcing its zoning regulations on federal land. We need not address intervenor's contention that county land use regulations are totally preempted, because we agree with petitioners that regardless of whether local land use regulations are preempted on federal land, the federal land where the access road will be constructed must be considered in identifying the proper notice area pursuant to ORS 197.763(2).

We addressed a nearly identical situation in *Warrick v. Josephine County*, 36 Or LUBA 81 (1999). In *Warrick*, the applicants proposed to provide access to a rural subdivision by obtaining a right-of-way across BLM property. As in the present case, the petitioners were not within the notice area of the proposed subdivision parcel but were within the notice area of the proposed access road across BLM land, and they did not receive notice of the hearing. *Id*. at 83. The petitioners in *Warrick* argued that they were entitled to notice because property which is the "subject of the notice" included all property on which development was proposed. The applicants responded that property which is the "subject of the notice" did not include adjacent property on which they proposed to acquire a right-of-way for access. We rejected that argument and held:

> "* * * The property that is the 'subject of the notice,' within the meaning of [notice requirements of ORS 197.763(2)], depends on the proposal before the county. *If the application proposes development on more than one parcel of property, then all those parcels of property are, or should be, property which*

[4] Intervenor does not dispute that petitioners filed their appeal within 21 days of when they received actual notice or knew or should have known of the decision.

> *is the 'subject of the notice,'* and property owners within the specified distances of such property are entitled to notice. * * *" *Id*. at 86-87 (emphasis added).

Although the applicants in *Warrick* did not raise the issue of federal preemption, as the emphasized language illustrates, it was the location of the proposed access road across BLM land rather than any regulation of the BLM land that triggered the notice requirements. In the present case, the proposed access road is discussed in detail in intervenor's application and is shown on the accompanying plans. Record 459, 474-77. The traffic impact study submitted with the application discusses the proposed access road in detail. Record 554-55. The decision requires, as a condition of approval, that the access road be provided, and that it be improved to county local road standards. Intervenor's application clearly proposes development on their parcel and also on part of the BLM parcel.

In *Warrick*, we accepted petitioners' unchallenged contention that the right-of-way across the BLM property was an easement and noted that an easement is a property interest. 36 Or LUBA at 87 n 4 and 5. Although intervenor's proposed access road in this case involves a permit rather than an easement, we find that the otherwise nearly identical situation in this case does not dictate a different result merely because the access road will be constructed pursuant to a BLM permit rather than an easement. Because the application proposes development on the BLM parcel, the portion of the BLM parcel where the applicant proposes to locate the right-of-way is property that is the "subject of the notice."

Our decision in *Warrick* can be read to say the ORS 197.763(2)(a)(C) 500-foot notice requirement should apply to the entire BLM parcel. We believe such a reading of ORS 197.763(2)(a)(C) goes too far. The 500-foot notice requirement applies to the part of the BLM parcel where the applicant proposes to locate the access road. That notice will ensure that persons owning property that is located within 500 feet of the access road will receive the same notice as persons who own property within 500 feet of other portions of the proposed development.

Petitioners did not receive the notice to which they were entitled under ORS 197.763(2)(a)(C). Therefore, the appeal was timely filed pursuant to ORS 197.830(3).

The motion to dismiss is denied.[5]

Dated this 11th day of January, 2001.

Michael A. Holstun
Board Member

[5] Notwithstanding our September 22, 2000 Order Suspending Deadline for Filing the Petition for Review, the petition for review shall be due 21 days after the county submits the supplemental record that is required by our Order on Record Objections, issued this date.