

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

3 JIM LUDWICK, et al.,)
) LUBA Nos. 83-117
4 Petitioners,) 83-118
) 83-119
5 vs.)
) ORDER DENYING
6 YAMHILL COUNTY,) MOTION TO DISMISS
)
7 Respondent.)

8
9 Respondent and intervenor move to dismiss these appeals on
10 the ground the notices of intent to appeal were filed after
11 expiration of the statutory deadline, i.e., more than 21 days
12 after the challenged decisions became final. We deny the
13 motion.

14 FACTS

15 Petitioners seek review of two ordinances and a related
16 Board order adopted by Yamhill County. Ordinance No. 357
17 changes the comprehensive plan designation of approximately 350
18 acres of land on the Eagle Point Ranch from "commercial
19 forestry" to "very low density." Ordinance No. 358 makes a
20 parallel change in the zoning designation of the property.
21 Both ordinances contain emergency clauses. Finally, Board
22 Order No. 83-530 applies a planned unit development overlay to
23 the property.

24 The challenged land use decisions were adopted and signed
25 by the members of the Yamhill County Commission at their
26 hearing of November 2, 1983. However, the decisions were not

1 filed in the office of the county clerk until November 8, 1983
2 because a map exhibit was not available until then.

3 Petitioners opposed the amendments and overlay designation
4 at various county hearings. They filed their notices of intent
5 to appeal on November 29, 1983, 21 days after the challenged
6 measures were recorded but more than 21 days after they were
7 adopted.

8 THE MOTION

9 The motion to dismiss contends the appeals were untimely
10 under ORS 197.830(7). That statute requires a notice of intent
11 to appeal a land use decision to be filed "...not later than 21
12 days after the date the decision sought to be reviewed becomes
13 final."

14 The moving parties argue the decisions at issue became
15 final, i.e., appealable, on November 2, 1983, the day they were
16 adopted and executed by the governing body. They make the
17 following points in support of the motion: (1) under ORS
18 203.045(9),¹ emergency ordinances of general law counties
19 such as Yamhill County are effective immediately upon passage;
20 therefore the ordinances became final on November 2, 1983, (2)
21 a Yamhill County procedural ordinance, Ordinance No. 353,
22 similarly provides that Board orders, resolutions and
23 ordinances are effective upon passage unless otherwise required
24 by law² or the document itself and (3) according to a rule of
25 this Board defining "final decision or determination" as one
26 which "...has been reduced to writing and which bears the

1 necessary signatures of the governing body," the challenged
2 decisions became final on November 2, 1983. See OAR
3 661-10-010(3).

4 Petitioners urge us to reject these arguments. Regardless
5 of [the] when the challenged measures were adopted and signed³,
6 they argue, the appeals cannot be considered untimely because
7 of the county's failure to provide the notices of decision
8 required by ORS 197.615. The statute, which appears in the
9 portion of ORS Chapter 197 relating to post-acknowledgement
10 procedure, states as follows, in pertinent part:

11 " (1) A local government that amends an
12 acknowledged comprehensive plan or land use
13 regulation or adopts a new land use
14 regulation shall mail or otherwise submit to
15 the director a copy of the adopted text of
16 the comprehensive plan provision or land use
17 regulation together with the findings
18 adopted by the local government...."

15 " (2) (a) Not later than five working days after the
16 final decision, the local government also
17 shall mail or otherwise submit notice to
18 persons who:

18 " (A) Participated in the proceedings leading to
19 the adoption of the amendment to the
20 comprehensive plan or land use regulation or
21 the new land use regulation; and

20 " (B) Requested of the local government in writing
21 that they be given such notice.

22 " (b) The notice required by this subsection shall:

23 " (A) Describe briefly the action taken by the
24 local government;

24 " (B) State the date of the decision;

25 " (C) List the place where and the time when the
26 amendment to the acknowledged comprehensive

1 plan or land use regulation or the new land
2 use regulation, and findings, may be
reviewed; and

3 "(D) Explain the requirements for appealing the
4 action of the local governments under ORS
197.830 to 197.845."

5 The county concedes it did not provide any notice of decision
6 which would conform to the provisions of ORS 197.615(2).

7 According to petitioners, the effect of the county's
8 failure to provide the required notices was to toll the running
9 of the 21 day appeal period established by ORS 197.830(7). As
10 stated in their brief:

11 "Either the time for appeal was extended or waived as
12 the notice required by ORS 197.615(2) was not sent or
13 respondent's land use decision was not final on
November 2, 1983 as those notices were not sent within
14 five days of the decision. Petitioners' Supplemental
Memorandum at 13.

15 Thus, even if the county is correct that the measures were
16 effective immediately under ORS 203.045(9), and county
17 ordinance, petitioners argue the decisions remained appealable
18 to LUBA because the requisite notice was not provided. Any
19 other reading of ORS 197.615(2), in their view, would render
20 the notice requirement a nullity and defeat legislative
21 intent. For the same reason, petitioners maintain our rule
22 defining "final decision or determination" must be governed by
23 ORS 197.615(2). That is, an appeal which is seemingly late in
24 terms of the definition stated in OAR 661-10-010(3) must
25 nevertheless be allowed where the county has not fulfilled its
26 statutory duty to provide notice of the challenged decision.

1 DISCUSSION

2 As a preliminary matter, we recognize that notice described
3 in ORS 197.615(2) need only be provided to persons who both
4 participated in the local government proceedings and requested
5 in writing that they be given notice. ORS 197.615(2)(a)(A) and
6 (B). Although there is no dispute in this case regarding the
7 first requirement, the county and intervenor claim that
8 petitioners are not persons who requested in writing that
9 notice be provided. Based on the record before us, however, we
10 do not agree, at least with respect to petitioners Ludwick and
11 Burcham.

12 The record indicates that petitioners Ludwick and Burcham
13 each filled out forms entitled "Public Comment/Notice
14 Registration Card" and submitted them to the Yamhill County
15 Department of Planning and Development on April 4, 1983. A
16 form was also submitted by Mr. Clay Moorhead, who is not a
17 petitioner in this case but who is evidently a member of
18 Petitioner Meadowview Homeowners Association.

19 Each completed form indicates opposition to the proposals
20 challenged in this case. Despite some ambiguity in the forms,
21 we also read them to request notification of any decision
22 reached by the county concerning the proposals. In our view,
23 the filing of these forms was sufficient to bring petitioners
24 Ludwick and Burcham within the coverage of ORS 197.615(2).
25 However, we must reach a different result with respect to
26 Petitioner Meadowview Homeowners Association. At least on the

1 record before us we cannot say that the association requested
2 notice of decision. The form filed by Mr. Moorhead makes no
3 reference to the association. ORS 197.615(2) requires that the
4 person who desires notification of a decision must request such
5 notification in writing. On this record no such request was
6 filed by Petitioner Meadowview Homeowners Association.
7 Accordingly, the association is not within the coverage of the
8 statute. We turn now to the question of the legal effect of
9 the county's failure to send notice under ORS 197.615(2) to
10 persons who were entitled to notice.

11 The individual petitioners' reliance on ORS 197.615(2) to
12 defeat the motion to dismiss presents a question of first
13 impression. The cited legislation is ambiguous. The statute
14 clearly imposes a duty on local government but it is silent as
15 to the consequences of failure to carry out the duty. In
16 resolving the statutory ambiguity we strive to carry out
17 legislative intent and to give meaning to the terms used in the
18 legislation. ORS 174.020; Fifth Ave. Corp. v. Washington Co.
19 Comm., 282 Or 591, 581 P2d 50 (1978).

20 As noted, petitioners urge us to read the statutory notice
21 requirement as a procedural component of the appeal provisions
22 contained in ORS 197.830. They contend the clear purpose of
23 ORS 197.615(2) is to insure that citizens participating in
24 post-acknowledgement proceedings at the local level are
25 informed when a land use decision has been made and are advised
26 of the availability of appeal to LUBA. According to

1 petitioners, "[t]he legislature obviously intended that
2 parties not lose their appeal rights due to lack of knowledge
3 concerning appeal rights." Petitioners' Memorandum at 6.

4 On the other hand, respondent and intervenor argue that
5 silence by the legislature with respect to the consequences of
6 failure to comply with ORS 197.615(2) should be interpreted in
7 light of the overall goal of expeditious land use appeals.
8 See, ORS 197.805. They urge us to give meaning to the statute
9 by holding that breach of the duty to provide notice of
10 decision does not toll the period for appeal to this Board, but
11 instead creates a separate cause of action in the injured party
12 against the county. The principal is derived from appeals in
13 civil litigation. See, Farwest Landscaping, Inc. v. Modern
14 Merchandising, 287 Or 653, 601 P2d 1237 (1979); Universal Ideas
15 v. Linn County, 64 Or App 805 ___ P2d ___ (1983). Under this
16 approach, we would dismiss these appeals as untimely.
17 Petitioners could then explore possible remedies against
18 Yamhill County for the alleged breach of ORS 197.615(2).

19 In resolving this dispute we find the most pertinent case
20 authority to be the recent decision by the Court of Appeals in
21 Bryant v. Clackamas County, 56 Or App 442, ___ P2d ___ (1982).
22 In that case, after certain partitioning proposals were
23 approved by a county hearings officer, neighbors filed appeals
24 with the county commission. However, the appeals were
25 dismissed as untimely under an ordinance which required appeals
26 to be filed within 10 days of the oral decision of the hearings

1 officer. Although the appeals did not conform to this
2 deadline, they were filed within 10 days after the decisions
3 were reduced to writing. 56 Or App at 444.

4 The Court of Appeals held the appeals to the county
5 commission could not be considered untimely. The case was
6 decided under ORS 215.416(7), a procedural statute governing
7 land use permits at the county level. The statute requires
8 that "written notice of the approval or denial [by the hearings
9 officer] shall be given to all parties to the proceeding." In
10 view of the explicit statutory requirement for written notice,
11 the court refused to enforce the conflicting procedural
12 provision in the county ordinance. With reference to statutory
13 notice the court commented:

14 "It would make that requirement a nullity if a county
15 were allowed to provide that the time for appeal may
16 expire before the parties have been given the required
17 notice. The time for taking an appeal cannot begin to
18 run until written notice is given." 56 Or App at 448.

19 The principal recognized in Bryant, supra, applies with
20 equal force in this instance. ORS 197.615(2) explicitly
21 requires that written notification of a final post
22 acknowledgement decision shall be provided to citizens who
23 participate in the local government proceeding and who request
24 notice. The notice must not only describe the decision and
25 state the date of its adoption, it must also "...explain the
26 requirements for appealing the action of the local government
under ORS 197.830 to 197.845." (emphasis added) The cross
reference to the statutes governing appeals to this Board gives

1 support to the position taken by petitioners. As in Bryant,
2 supra, the notice requirement would be a nullity if the period
3 for appeal to this Board could expire before the required
4 notice was provided by the county. We believe the legislature
5 intended, at least with respect to the post-acknowledgement
6 actions described in ORS 197.615(2), that notice containing the
7 required information is a prerequisite to the running of the 21
8 day period for appeals.⁴

9 We are unable to accept respondent and intervenor's
10 argument that failure to provide notice under ORS 197.615(2)
11 does not toll the running of the appeal period, but instead
12 creates a cause of action against the county. The rule has its
13 place in the structured context of civil litigation. It is
14 not suited to the less formal context of land use control,
15 wherein elements of legislative, quasi-judicial and
16 administrative action converge.

17 The differences between civil litigation and land use
18 decisionmaking reinforce our refusal to interpret ORS
19 197.615(2) along the lines urged by the county and
20 intervenor.⁵ The fact that we play our role as a component
21 of the statewide land use planning program also buttresses our
22 decision. Our own rules of procedure recognize that in
23 performing this role, we seek to promote speedy decisions which
24 also afford "...all interested persons reasonable notice and
25 opportunity to participate..." OAR 661-10-005. We believe our
26 decision in this case is consistent with this goal. It is also

1 consistent with the general principal that statutes giving the
2 right of appeal are liberally construed; an interpretation
3 which will work, a forfeiture of that right is not favored. 3
4 Sutherland, Statutory Construction 4th, §67.08 (1974).

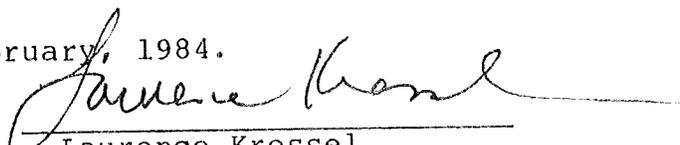
5 Finally, while damages might be a satisfactory remedy where
6 the duty to provide notice of the entry of judgment is not
7 carried out by court officials, Universal Ideas v. Linn County,
8 supra, the approach seems both impractical and unwise in the
9 context of land use planning. We can foresee great practical
10 difficulty in measuring the damages suffered by a citizen
11 deprived of the opportunity to obtain review of a land use
12 measure by the county's breach of ORS 197.615(2). From the
13 standpoint of public policy it would be far better to maintain
14 reasonably open access to forums for the review of land use
15 decisions (as we do in this case) than (as urged by respondent
16 and intervenor) to restrict access and require affected
17 citizens to seek compensation for the lost opportunity to show
18 that policy has been contravened.

19 Based on the foregoing, the motion to dismiss these appeals
20 with respect to Petitioners Ludwick and Burcham is denied. The
21 motion is granted with respect to the appeal of Petitioner
22 Meadowview Homeowners Association.⁶

23 The county shall file the record(s) in these appeals within
24 21 days of this order.

25 Dated this 22nd day of February, 1984.

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Laurence Kressel
Referee

FOOTNOTES

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"ORS 203.045(9):

"An ordinance adopted in accordance with this section, if not an emergency ordinance, shall take effect on the 90th day after the date of its adoption, unless it prescribes a later effective date or is referred to the electors of the county. If an ordinance is referred to the electors, it shall take effect only upon the approval of a majority of those voting on the proposed ordinance. An emergency ordinance may take effect immediately upon the date of its adoption."

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In a supplemental brief respondent and intervenor argue that although Oregon Statutory Law may once have conditioned the effectiveness of general law county action on entry in the county journal, there is authority that this is no longer the case. In their view, this reinforces the argument that ORS 203.045(9) quoted in the preceding footnote, should be literally applied in this case, i.e., the challenged emergency ordinances took effect on November 2, 1983 and became appealable on that date. We find it unnecessary to rule on the question of whether official action of a general law county must be entered in the county journal in order for the action to become effective, because we decide this case under ORS 197.615(2). In any event, there is room for debate as to whether the date an ordinance becomes effective is identical to the date it becomes appealable under ORS 197.830(7).

3

Petitioners dispute the contention the measures became "final" (i.e, appealable) under OAR 661-10-010(3) on the day of adoption. They contend the unavailability of the map exhibit until November 8, the day of recordation, took the measures outside of the cited rule until that date. However, they have not explained in what way the exhibit was critical to the decisions. We decline to speculate on the point. On this record, we cannot say the decisions were incomplete in any material way by virtue of the missing map.

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2 As noted at page 5 of our opinion, the notice is only
3 required to be provided to those who participate in the
4 proceedings and request notice in writing. ORS
5 197.615(2)(a)(A) and (B).

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6 For example, as petitioners point out, parties in
7 civil cases are typically represented by counsel and are
8 advised of actions taken by the court at all stages of the
9 proceedings. See, e.g., ORCP 9. In the land use area, by
10 contrast, the class of affected citizens is often
11 difficult or impossible to define. Those citizens who do
12 choose to participate often represent themselves. Also,
13 many land use decisions are made in the absence of
14 affected citizens.

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13 Petitioners also argue the county should be estopped
14 from claiming the appeals period began to run on
15 November 2 because they were advised by county planners
16 and a secretary to the commission that the period would
17 begin when the decisions were recorded. Assuming estoppel
18 is theoretically available as a defense in a case against a
19 municipality, Wiggins v. Barret and Associates, 295 Or
20 679, 700 P2d (1983) (Linde, J. specially
21 concurring), we do not find a basis for estoppel in this
22 case.

17
18 First, if petitioners are attempting to estop the
19 county from claiming its ordinance became effective on
20 adoption under ORS 203.045(a), they are foreclosed by
21 Bankus v. City of Brookings, 252 Or 257, 260, 449 P2d 646
22 (1969) (estoppel cannot arise from action of city official
23 "who purports to waive provisions of mandatory ordinance
24 or otherwise exceeds his authority. See also, Solberg v.
25 City of Newberg, 56 Or App 23, 28, P2d (1982). If
26 petitioners are instead attempting to estop the county
from relying on our rule defining when decisions are
final, OAR 661-10-010(3), the same principal applies.

23
24 Second, regardless of the above points, we do not
25 believe the elements of an estoppel have been proved.
26 See, Shaw v. Northwest Truck Repair, 273 Or 452, 541 P2d
1277 (1975).