

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

3 LEAGUE OF WOMEN VOTERS OF COOS)
 COUNTY, MARGUERITE WATKINS,)
4 ALICE CARLSON, 1000 FRIENDS OF)
 OREGON, HOWARD WATKINS,)
5)
 Petitioners,)
6)
 vs.)
7)
 COOS COUNTY,)
8)
 Respondent,)
9)
 and)
10)
 COOS HEAD TIMBER COMPANY,)
11)
 Respondent-Intervenor.)

LUBA No. 86-052

ORDER GRANTING
MOTION TO DISMISS APPEAL

12
13 Respondent's Planning Commission approved a conditional use
14 permit for a dwelling in conjunction with forest use in May
15 1986. Petitioners appealed the decision to the Board of
16 Commissioners. After a hearing on June 9, 1986, the Board
17 dismissed the appeal on grounds petitioners lacked standing.
18 An order of dismissal, including findings of fact, was adopted
19 at a Board meeting on June 18, 1986. On the same day, the
20 order was signed by two members of the three member Board.

21 Petitioners appealed the dismissal order to this Board.
22 Their Notice of Intent to Appeal was filed on July 10, 1986, 22
23 days after the order was adopted and signed by the county
24 governing body. Respondents¹ move for dismissal of the
25 appeal on grounds it is untimely under ORS 197.830(7).² We
26 allow the motion.

1 DISCUSSION

2 Petitioners resist the motion by arguing that the 21 day
3 appeal period began sometime after June 18, 1986, the date the
4 challenged order was adopted. Their first theory is that the
5 appeal period was tolled by the county's failure to provide
6 them with written notice of the decision, as required by ORS
7 215.416(8) and a county ordinance. Alternatively, they argue
8 that the decision was not final, and therefore the appeal
9 period did not begin to run, until the county commission's
10 order was filed in the office of the county clerk.

11 1. Notice of Decision

12 ORS 215.416 governs county procedure for the issuance of
13 land development permits. ORS 215.416(8) provides:

14 "Written notice of the approval or denial [of a
15 permit] shall be given to all parties to the
proceeding."

16 The county concedes that written notice of the decision was not
17 mailed to petitioners' attorney until June 26th or 27th, over a
18 week after the decision was adopted. It is also undisputed
19 that petitioners' attorney received the written notice on July
20 9, two weeks after it was mailed. Petitioners' appeal to this
21 Board must be considered timely under ORS 197.830(7) if the
22 period for appeal began to run on the date the decision was
23 mailed to their attorney or on the date he received the
24 decision. As discussed below, we conclude that the period for
25 appeal began prior to both dates.³

26 The consequences of a county's failure to provide the

1 notice required by ORS 215.416(8) were examined in Bryant v.
2 Clackamas County, 56 Or App 442, 643 P2d 649 (1982). A county
3 ordinance required appeals of decisions of the hearings officer
4 to be filed with the governing body within 10 days of the
5 officer's oral decision. Opponents of permits approved by the
6 hearings officer appealed his decisions after expiration of the
7 10 day period. The county dismissed the appeal as untimely.
8 However, the dismissal was reversed by LUBA and the Court of
9 Appeals. Relying on the statutory notice requirement, the
10 court stated:

11 "Although LUBA decided that written findings must be
12 entered by the hearings officer under ORS 215.416(6)
13 before the time for appeal may begin to run, we decide
14 the case on a more limited basis. Whether or not the
15 statute requires that the findings of the hearings
16 officer must be reduced to writing before the time for
17 appeal may begin to run, subsection (7) specifically
18 requires that '[w]ritten notice of the approval or
19 denial shall be given to all parties to the
20 proceeding.' It would make that requirement a nullity
21 if a county were allowed to provide that the time for
22 appeal may expire before the parties have been given
23 that required notice. The time for taking an appeal
24 cannot begin to run until written notice is given.

18 "In this case, the only written notice the parties
19 received were the written findings and decisions of
20 the hearings officer entered April 18 and July 7,
21 1980. The county ordinance requiring that the notices
22 of appeal be filed before the parties were given the
23 written notice required by statute is invalid." 56 Or
24 App at 448.

22 Petitioners recognize that the present case is factually
23 different from Bryant, but they maintain that the principle
24 underlying the decision in that case is applicable here. The
25 principle, they say, is that an appeal period should not begin
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1 to run until the notice of decision required by ORS 215.416(8)
2 is given. We find merit in the principle advocated by
3 petitioners. See text accompanying footnote 4. However, we
4 cannot agree that the principle was adopted in Bryant or that
5 it may be applied in this case to defeat the motion to dismiss
6 the appeal.

7 In Ludwick v. Yamhill County, 72 Or App 224, 696 P2d 536
8 (1985); rev den 299 Or 443, the county approved amendments to
9 its acknowledged comprehensive plan and zoning ordinance.
10 Opponents of the approvals appealed them to LUBA more than 21
11 days after the appeals became final. The county moved to
12 dismiss the appeal under ORS 197.830(7). As in this case, the
13 petitioners answered the motion by arguing that the time for
14 taking the appeal was tolled until they had notice of the
15 decisions. Importantly, however, they did not rely on the
16 notice requirement in ORS 215.416(8), as petitioners do here,
17 but instead claimed entitlement to notice under ORS
18 197.615(2) (notice of post acknowledgement amendment of plan or
19 land use regulation). The latter statute provides:

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

22 (A) Participated in the proceedings leading to the
23 adoption of the amendment to the comprehensive
plan or land use regulation or the new land use
24 regulation; and

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

26 (b) The notice required by this subsection shall:

1 (A) Describe briefly the action taken by the
2 local government;

3 (B) State the date of the decision;

4 (C) List the place where and the time when the
5 amendment to the acknowledged comprehensive plan
6 or land use regulation or the new land use
7 regulation, and findings, may be reviewed; and

8 (D) Explain the requirements for appealing the
9 action of the local government under ORS 197.830
10 to 197.845."

11 Relying on Bryant v. Clackamas County, supra, we held that
12 the period for appeal was tolled by the county's failure to
13 provide the required notice. Ludwick v. Yamhill County, 10 Or
14 LUBA 442 (1984) (Order Denying Motion to Dismiss). The Court
15 of Appeals affirmed our decision, but pointed out that Bryant
16 could not be relied on to support it. Ludwick v. Yamhill
17 County, 72 Or App 224, 696 P2d 536 (1985); rev den 299 Or 443.
18 The court stated:

19 "LUBA analogized the situation here to Bryant. It
20 reasoned that ORS 197.615(2) requires notice, as did
21 the statute we construed in Bryant, and that 'notice
22 containing the required information [under ORS
23 197.615(2)] is a prerequisite to the running of the 21
24 day period for appeals.' The difficulty with LUBA's
25 reasoning is that the issue in Bryant was whether a
26 local ordinance made a nullity of a state statute;
here, two statutes are involved, and the present
question differs in degree rather than in kind from
the question in Farwest Landscaping, Inc. v. Modern
Merchandising, supra, and Junction City Water Control
v. Elliott, supra. However, that difference in degree
is significant. As LUBA observed in its order denying
the motion to dismiss, the notice required by ORS
197.615(2), unlike the notice of entry of judgment
that the clerk is required to send pursuant to ORCP
70B, must explain to the recipients 'the requirements
for appealing the action of the local government under
ORS 197.830 to 197.845.' ORS 197.615(2)(b)(D). That

1 language was added to ORS 197.615 by the same 1983 act
2 through which ORS 197.830(7) was adopted. Or Laws
3 1983, ch 827, sec 9 and 31. Unlike ORCP 70B, ORS
4 197.615(2) does not simply require notice that an
5 appealable event has occurred. It also requires an
6 explanation of the procedure for appealing. We agree
7 with LUBA that the legislature intended to make the
8 running of the time for filing a notice of intent to
9 appeal under ORS 197.830(7) contingent on the giving
10 of notice to an appealing party who is entitled to
11 notice under ORS 197.615(2). LUBA did not err in
12 denying the county's and the association's motion to
13 dismiss." 72 Or App at 229-30.

8 Petitioners' position in this appeal would be supported by
9 Ludwick, supra, if this case involved a post acknowledgement
10 action subject to ORS 197.615(2). However, this is not such a
11 case. Further, we read the appellate court's opinion in
12 Ludwick to reject the principle petitioners would extract from
13 Bryant. Contrary to petitioners' position, Ludwick instructs
14 that a statutory appeal period is not tolled by a failure to
15 provide a required notice of decision unless the statute
16 requiring the notice expressly or impliedly mandates that
17 result.⁴ ORS 215.416(8) is not such a statute. It requires
18 notice that an appealable event has occurred but nothing more.
19 The notice statute construed in Ludwick, by contrast,
20 specifically requires that the notice include information
21 pertinent to appeal rights.⁵

22 Based on Ludwick v. Yamhill County, supra, we conclude that
23 the period for appealing the county's order was not tolled
24 until notice of the decision was mailed to petitioners'
25 attorney.⁶ We turn next to petitioners' alternative argument
26 that the decision was not final (appealable) until it was filed

1 in the office of the county clerk.

2 2. Final Land Use Decision

3 Our jurisdiction extends only over "final land use
4 decisions." ORS 197.015(10)(a)(A). The legislature has not
5 defined the quoted term. Our rules define "final decision or
6 determination" as a decision or determination that is reduced
7 to writing and bears the necessary signatures of the governing
8 body. OAR 661-10-010(3). However, in Columbia River
9 Television v. Multnomah County, 299 Or 325, ___ P2d ___ (1985),
10 the Supreme Court stated:

11 "The rule is an attempt to describe a final decision.
12 It prescribes some minimal, required characteristics
13 that the decision must contain before it will be
14 considered by LUBA to be a final decision for purposes
15 of review. The rule requires that before a decision
16 will be deemed to be final, it must be reduced to
17 writing and contain the requisite signatures of the
governing body. What signatures are 'necessary' is a
determination (apparently) left to the local
government. The rule does not address when an order
of a locality is final. This decision, likewise, is
one left to the local government." (footnotes
omitted.) 299 Or at 333.

18 Unlike the ordinance construed in Columbia River Television
19 v. Multnomah County, supra, the Coos County ordinance does not
20 define when a land use decision is final.⁷ Respondents say
21 the challenged order was final on the date it was adopted and
22 signed, June 18, 1986. In the absence of a local rule making
23 the decision final on some other date, we agree with this
24 position.

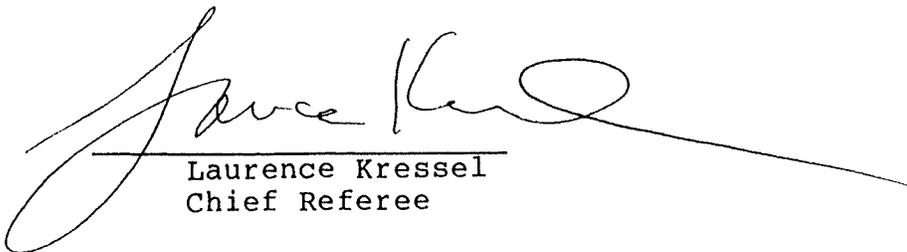
25 Petitioners argue that the decision was final on June 23,
26 1986, when the order was filed with the county clerk. They do

1 not contend, however, that state statute or local rule
2 prevented the decision from being final until it was filed.
3 Rather, they contend the decision could not be considered final
4 until it was available for public inspection, and it was not
5 available until the filing date. However, assuming that a
6 decision cannot be considered final until it is publicly
7 available, petitioners have not proved that the challenged
8 order was unavailable until June 23, 1986.⁸ We believe it is
9 reasonable to assume that the order, a public record under ORS
10 192.005, was available for inspection on the day it was
11 adopted. The burden is on petitioners to show that the county
12 shielded its order from public review until a later date. They
13 have not carried this burden.

14 Based on the foregoing, we conclude that the Notice of
15 Intent to Appeal was not timely filed. ORS 197.830(7). The
16 appeal is therefore dismissed.

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1 Dated this 29th day of August, 1986.

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5 Laurence Kressel
6 Chief Referee

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FOOTNOTES

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4 Motions to Dismiss were filed by Coos county and the
5 permit applicant, Coos Head Timber Company.

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7 ORS 197.830(7) states, in pertinent part,
8 "A notice of intent to appeal a land use decision shall
9 be filed not later than 21 days after the date the
10 decision sought to be reviewed becomes final."

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12 ORS 215.416(8) pertains to "permits," a term defined as
13 "discretionary approval of a proposed development of land under
14 ORS 215.010 to 215.438 or county legislation or regulation
15 adopted pursuant thereto." ORS 215.402(4). The challenged
16 order dismissing petitioners' appeal is not a permit on its
17 face. However, in effect the order approves a permit. It
18 disposes of an appeal of a decision to allow the non-forest
19 dwelling proposed by Respondent-Intervenor. Therefore, the
20 notice requirement in ORS 215.416(8) is applicable.

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22 The Court of Appeals recognized a parallel between the
23 situation in Ludwick and cases holding that a court clerk's
24 failure to notify a party of the entry of a civil judgment
25 (ORCP 70B) does not extend the time for filing an appeal under
26 ORS, ch 19. See Farwest Landscaping, Inc. v. Modern
Merchandising, 287 Or 653, 601 P2d 1237 (1979); Junction City
Water Control v. Elliott, 65 Or App 548, 672 P2d 59 (1983).
Those cases were distinguished from Ludwick because they
involved a notice requirement that did not implicitly make the
running of the period for appeal contingent on the provision of
notice. See also Simpson v. Simpson, 73 Or App 1, 697 P2d 570
(1985), rev allowed 299 Or 578, 704 P2d 509 (1985).

The parallel between appeals of court judgments and appeals
of local government land use decisions has troublesome
aspects. In the civil appeals context, the law provides a
uniform procedure and location for the entry of judgments. See
ORCP 70(B). See also Blackledge v. Harrington, 289 Or 141, 611
P2d 292 (1980); Henson and Henson, 61 Or App 210, 656 P2d 345
(1982). Theoretically, at least, attorneys can keep track of
appeal periods by monitoring the docket in which judgments are

1 entered. This is not the case where local land use decisions
2 are concerned. Although they are public records, state law
3 does not provide a uniform procedure or place for filing or
4 recording them. Interested parties therefore may have
5 difficulty in ascertaining when the period for appeal to LUBA
6 begins.

7 If, as we suspect, Farwest Landscaping and similar cases
8 are based on the idea that the entry of a judgment under ORCP
9 70B provides sufficient notice of the commencement of the
10 appeal period, it is questionable whether those cases should
11 govern in the less formal context of land use appeals. In the
12 land use area, where the date the appeal period commences may
13 be difficult to determine, we find merit in the argument that
14 conformance with statutory requirements for notifying the
15 parties of a decision should be a condition precedent to the
16 running of the appeal period. However, we recognize that this
17 approach is at odds with the court's opinion in Ludwick v.
18 Yamhill County, supra.

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13 Petitioners' reading of ORS 215.416(8) derives some support
14 from the statute's legislative history. It was enacted in 1979
15 (as ORS 215.416(7)) as a part of the same law that created LUBA
16 and the procedures for LUBA appeals. Or Laws 1979, ch 772, sec
17 10a. Inclusion of the permit notice requirement in the bill
18 creating LUBA may suggest legislative intent to make local
19 notification a prerequisite to commencement of the LUBA appeal
20 process. See Ludwick v. Yamhill County, supra, 72 Or App at
21 229. As we read Ludwick, however, the more important indicator
22 of legislative intent is the text of the notice statute
23 itself. The text of ORS 215.416(8) does not support
24 petitioners' position.

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21 Petitioners argue that the date their attorney received the
22 notice, rather than the date it was mailed, commences the
23 period for appeal. However, ORS 215.416(8), on which they
24 rely, requires that written notice be "given" to the parties,
25 not that it be received.

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25 The ordinance does contain the following provision
26 concerning notice of final decisions:

25 "Notice of Final Decision. Within seven (7) days of
26 any final action taken by the Hearings Body or Board

1 of Commissioners, the decision shall be reduced to
2 writing. Within three (3) days of reducing the final
3 action to writing, the Planning Director shall provide
4 the applicant or appellant with written notice of such
5 action." Section 5.7.800, Coos County Zoning
6 Ordinance.

7 The provision does not define when a decision is final, but
8 rather dictates when notice of a final decision is to be
9 given. Petitioners point out (and Respondents do not deny)
10 that the Planning Director did not comply with the three-day
11 rule, but instead mailed the decision to their attorney eight
12 days after it was reduced to writing. They add that the notice
13 did not reach their attorney until about two weeks later,
14 arriving on the last day of the period for appeal of the
15 decision to LUBA.

16 Petitioners maintain that if the notice requirement had
17 been adhered to, they would have received the decision in time
18 to file a timely appeal. We will not speculate on whether this
19 is correct. The important question, in our view, is whether
20 the county's failure to adhere to its notice requirement
21 suspends the period for appeal under ORS 197.830(7). The
22 answer is no. See Ludwick v. Yamhill County, 72 Or App 224,
23 229-30, 696 P2d 536 (1985; rev den 299 Or 443).

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26 The strongest evidence petitioners offer to support their
claim is the affidavit of Pamela K. Barre, secretary to
petitioners' attorney. In pertinent part, the affidavit states:

"On or about 20 June 1986 Mr. Liberty asked me to
inquire of Coos County when they would be sending a
copy of the Board of Commissioners' decision in the
League of Women Voters of Coos County (et al) appeal
of the administrative approval of the application for
a forest dwelling submitted by Coos Head Timber. He
told me he would also make calls if necessary.

"On Tuesday, 24 June 1986 I called John Knight's
office to ask when he could expect a copy of the
Board's decision. His secretary, Carolyn Sumstine,
told me it had been sent to the clerk's office for
filing and when it was returned to them they would
forward a copy to us. She said she didn't know when
that would be." Affidavit of Pamela K. Barre at 1.

The affidavit does not demonstrate that the county's order was
unavailable for public inspection until it was filed in the
office of the county clerk. It merely indicates that four days

1 after its adoption, the order was unavailable from the county
2 counsel because it had been sent to the clerk's office for
3 filing.

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