

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

MARVIN L. DACK,
Petitioner,
vs.
CITY OF CANBY,
Respondent,
and
JOHN TORGESON,
Intervenor-Respondent.)

LUBA No. 88-073
ORDER ON
MOTION TO DISMISS

Respondent city moves for dismissal of this review proceeding claiming the appeal is not timely. The decision on review is the city council's denial of petitioner's appeal of a city administrator's decision conferring nonconforming use status on a gravel extraction operation.

The facts are nearly identical to those in Pienovi v. City of Canby, ___ Or LUBA ___ (LUBA No. 87-112/113, April 14, 1987). In that case, we ruled that the same city administrator's decision, rendered without a hearing and recognizing nonconforming use status of an aggregate removal operation, was a "permit" as the term is defined in ORS 227.160(2).¹ Because of this ruling, we found ORS 227.175(10) applicable. This statute requires notice of the decision "be given in the same manner as notice of the hearing would have been given if a hearing had been held." Under the

1 city's decision making process, hearings are not provided for
2 staff decisions, but appeals of staff decisions are possible.
3 Notice of staff decisions rendered without a hearing must be
4 provided to certain persons under the statute and the city's code.

5 The City of Canby's Land Development Ordinance (CLDO)
6 provides that notice of a land use hearing must be given by
7 mail to property owners within 200 feet of the subject
8 property, and notice must also be posted and published. CLDO
9 10.8.30(D). In this case, petitioner Dack lives within 200
10 feet of the subject property; and, under the city's ordinance
11 and ORS 227.175(10), he was entitled to notice of the
12 administrator's decision.

13 In this case, the city agrees that petitioner Dack was
14 entitled to notice of the decision. The city advises it has
15 not given notice to petitioner. However, the city asserts
16 Mr. Dack attended the same hearings as Mr. Pienovi in June
17 1987. According to the city, Mr. Dack, therefore, had actual
18 notice of the staff decision in question. Notwithstanding this
19 knowledge, Mr. Dack waited until July 11, 1988 to file his
20 request for a hearing with the city. We understand the city to
21 argue the mailed individual notice required under the city's
22 code and the statute is not necessary because Mr. Dack had
23 actual notice. As a result, the city argues this appeal must
24 be dismissed because Mr. Dack failed to follow the available
25 city appeal procedure in a timely manner.²

26 We do not believe the appeal should be dismissed. In

1 Pienovi, supra, we concluded the petitioner in that appeal was
2 not entitled to written notice of a decision because he did not
3 live within 200 feet of the subject property. The city,
4 however, was obliged under its code to publish and post
5 notice. It did not do so, but petitioner Pienovi was aware of
6 the decision of the city administrator, notwithstanding the
7 city's failure to provide published or posted notice. We held
8 his failure to act on this awareness within the 10 day time
9 limit provided for in the city's ordinance was fatal to the
10 appeal. We found petitioner's actual knowledge of the decision
11 was equivalent to the notice he should have been provided by
12 posting or publication.

13 In this case, petitioner Dack was entitled to written
14 notice of the decision. The Court of Appeals, in construing
15 notice requirements for counties, made it quite clear that in
16 cases in which written notice is required, the decision becomes
17 final for purposes of appeal only after the written notice is
18 mailed or delivered personally to the party seeking to appeal.
19 League of Women Voters v. Coos County, 42 Or App 673, 681, 729
20 P2d 588 (1986).

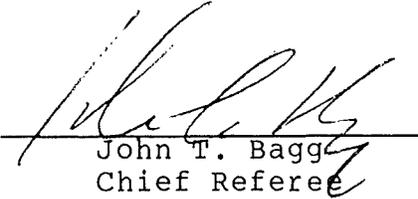
21 * * * the duty to give notice under ORS 215.416(8)
22 or, for that matter, under ORS 197.615(2), is not an
23 onerous burden. Nevertheless, this is at least the
24 fourth case which has reached this court since 1982 in
25 which the jurisdictional effect of a failure to
26 perform that duty or to perform it punctually has been
an issue. * * * The cases illustrate the frequency
with which this entirely avoidable problem has arisen;
they also demonstrate the futility of attempting to
deal with it on a case-by-case basis. We hold that,
in all LUBA cases to which ORS 215.416(8) applies, the

1 decision becomes final for purposes of appealing to
2 LUBA under ORS 197.830(7) only after the prescribed
3 written notice of the decision is mailed or delivered
4 personally to the party seeking to appeal." 82 Or App
5 673 at 680-681.³

6 Although the court in the footnote omitted, supra,
7 expressly limited its holding in ORS 215.416(8), we see nothing
8 in the court's opinion, or in any other opinion to which we
9 have been cited, suggesting that the court would view the
10 notice requirements in ORS 227.175(10) any differently.
11 Because ORS 227.175(10) and CLDO 10.8.30(D) require that
12 written notice be provided to petitioner, it must be provided
13 before the time within which petitioner must appeal begins to
14 run. Actual notice does not stand in place of written notice.

15 For these reasons, we deny the motion to dismiss.

16 Dated this 13th day of October, 1988.

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18 John T. Baggy
19 Chief Referee
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FOOTNOTES

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ORS 227.160(2) provides:

"'Permit' means discretionary approval of a proposed development of land * * *."

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The appeal procedure is provided by CLDO 10.8.40(e). It provides a 10 day time limit for appeals of staff decisions to the planning commission.

3

ORS 215.416(8) subsequently was recodified at ORS 215.416(10). The notice provisions in ORS 215.416(10) and ORS 227.175(10) are substantially identical.