

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HERU H. TARJOTO,)
Petitioner,)
vs.) LUBA Nos. 95-052 and 95-053
LANE COUNTY,) FINAL OPINION
Respondent.) AND ORDER

Appeal from Lane County.

Wendie L. Kellington, Portland, represented petitioner.

19 Stephen L. Vorhes, Assistant County Counsel, Eugene,
20 represented respondent.

SHERTON, Chief Referee; GUSTAFSON, Referee; LIVINGSTON, Referee, participated in the decision.

DISMISSED 07/11/95

27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of ORS
29 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

3 Petitioner appeals two county planning director
4 decisions, each of which approves a special use permit for a
5 dwelling not related to forest management (nonforest
6 dwelling) in the Impacted Forest Lands (F-2) zone.

7 **FACTS**

8 ORS 215.416(11)(a) allows a county decision maker to
9 approve or deny an application for a land use permit without
10 a hearing, if notice of the decision is given to certain
11 persons and an opportunity is provided for a de novo appeal
12 of the decision to a hearings officer, the planning
13 commission or the governing body.¹ The Lane Code (LC)
14 establishes such a procedure for county decisions on
15 applications for special use permits for nonforest dwellings
16 in the F-2 zone.

17 The following facts are undisputed. Without holding a
18 hearing, the county planning director issued two decisions

¹ORS 215.416(11)(a) provides, in relevant part:

"The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. * * * An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. [T]he appeal shall be a de novo hearing."

1 approving applications for nonforest dwellings on two
2 properties in the F-2 zone. With regard to such planning
3 director decisions, LC 14.100(4)(c) requires that notice of
4 the decision be mailed to the owners of property "[w]ithin
5 500 feet of the exterior boundaries of the contiguous
6 property ownership which is the subject of the application
7 if the subject property is within a farm or forest zone."
8 On January 3, 1994, the county mailed notice of the
9 challenged planning director decisions to certain persons.
10 LC 14.505(1) and 14.510 provide that such planning director
11 decisions may be appealed to the county hearings officer,
12 and that such appeals must be filed within 10 days after the
13 date the planning director's decision is signed.²

14 Petitioner owns property adjacent to both properties
15 that are the subject of the nonforest dwelling applications
16 at issue in this appeal. Consequently, under
17 LC 14.100(4)(c) petitioner was entitled to mailed notice of
18 the planning director decisions approving the subject
19 nonforest dwellings. However, the county failed to mail
20 notice of the decisions to petitioner. Petitioner first
21 learned of the existence of the planning director decisions
22 on March 14, 1995. On March 20, 1995, petitioner filed
23 local appeals of the planning director decisions. On
24 March 22, 1995, the county planning department accepted

²Under LC 14.505(1) and 14.300, the hearings officer's review is de novo, as required by ORS 215.416(11)(a).

1 petitioner's local appeals and scheduled them for hearing
2 before the hearings officer.³ On March 29, 1995, petitioner
3 filed notices of intent to appeal the planning director
4 decisions at LUBA, initiating this appeal proceeding.

5 **MOTION TO DISMISS**

6 The county moves for dismissal of this consolidated
7 appeal proceeding on the ground that under
8 ORS 197.825(2)(a), LUBA's jurisdiction is limited to "cases
9 in which the petitioner has exhausted all [local] remedies
10 available by right before petitioning [LUBA] for review."
11 The county argues that both ORS 215.416(11) and LC 14.100(4)
12 require that petitioner be given notice of, and an
13 opportunity for a local appeal of, the planning director's
14 decisions. The county further argues that, in this
15 circumstance, the planning director's decisions became final
16 as to petitioner only when petitioner was given the required
17 notice of those decisions. League of Women Voters v. Coos
18 County, 82 Or App 673, 799 P2d 588 (1986); Pautler v. City
19 of Lake Oswego, 23 Or LUBA 339 (1991); Komning v. Grant
20 County, 20 Or LUBA 481 (1990). According to the county,
21 because it accepted petitioner's local appeals of the
22 planning director's decisions, under ORS 197.825(2)(a)
23 petitioner cannot appeal the planning director's decisions

³When such a local appeal is filed, LC 14.520 requires the planning department to "determine if [the appeal] was received within the 10 day appeal period and if it contains the contents required by LC 14.515 * * *."

1 directly to LUBA.

2 Petitioner contends that because the planning director
3 decisions were made without a hearing, ORS 197.830(3) gives
4 petitioner a right to appeal those decisions directly to
5 LUBA. Petitioner further contends that because he was
6 entitled to written notice of the subject planning director
7 decisions pursuant to LC 14.100(4)(c), ORS 197.830(3)(a)
8 applies, and his notices of intent to appeal are timely
9 because they were filed within 21 days after petitioner
10 obtained actual notice of the planning director decisions.
11 Petitioner also argues that the requirement of
12 ORS 197.825(2)(a) to exhaust available local remedies is not
13 applicable in circumstances where the deadline for filing a
14 local appeal expires before petitioner gets actual notice of
15 a land use decision made without a hearing. Beveled Edge
16 Machines, Inc. v. City of Dallas, 28 Or LUBA 790, 795 (1995)
17 (Beveled Edge); Kevedy, Inc. v. City of Portland, 28 Or LUBA
18 227, 239-40 (1994) (Kevedy).

19 ORS 197.830(3) was added to the land use statutes in
20 1989, and provides:

21 "If a local government makes a land use decision
22 without providing a hearing or makes a land use
23 decision which is different from the proposal
24 described in the notice to such a degree that the
25 notice of the proposed action did not reasonably
26 describe the local government's final actions, a
27 person adversely affected by the decision may
28 appeal the decision to [LUBA] under this section:

29 "(a) Within 21 days of actual notice where notice
30 is required, or

1 "(b) Within 21 days of the date a person knew or
2 should have known of the decision where no
3 notice is required." (Emphasis added.)

4 We have not previously determined whether
5 ORS 197.830(3) applies to a situation where a county or city
6 decision is made pursuant to local procedures authorized by
7 ORS 215.416(11) or 227.175(10).⁴ As explained above, these
8 statutory provisions allow a local government to make a land
9 use permit decision without a hearing, but require that
10 notice of the decision and an opportunity for a de novo
11 local appeal be provided.⁵ The question we are presented
12 with in this case is if a county fails to provide a person

⁴In appeals of local government decisions made prior to the enactment of what is now ORS 197.830(3), we held that where a local government fails to provide the notice of a decision on a permit application made without a hearing required by ORS 215.416(11) or 227.175(10), any time period set by the local code for filing a local appeal does not begin to run until the required notice of the decision is provided to the appellant, and that ORS 197.825(2)(a) requires that such local appeals be exhausted before appealing to LUBA. Citizens Concerned v. City of Sherwood, 21 Or LUBA 515, 528 n16 (1991); Komning v. Grant County, supra, 20 Or LUBA at 493; Dack v. City of Canby, 17 Or LUBA 1015, 1017 (1988); Pienovi v. City of Canby, 16 Or LUBA 604 (1988); see League of Women Voters v. Coos County, 82 Or App 673, 679-81, 729 P2d 588 (1986). In Pautler v. City of Lake Oswego, supra, 23 Or LUBA at 341 n3, we specifically reserved judgment on whether ORS 197.830(3) affects the requirement for exhausting a local appeal in such situations.

⁵Both Beveled Edge, supra, and Kevedy, supra, concerned city permit decisions made pursuant to the process authorized by ORS 227.175(3) and (5), whereby an initial city decision on a permit application is made only after a hearing, and notice of such hearing must be given in accordance with ORS 197.763. The codes of both cities involved in Beveled Edge and Kevedy provided an opportunity for a local appeal, but as far as we can tell, an opportunity for a local appeal in those circumstances is not required by statute. In Beveled Edge, the petitioner was not given notice of the city hearing as required by ORS 197.763(3). In Kevedy, the petitioner contended the notice of the city hearing did not reasonably describe the city's action.

1 with the notice of a decision made without a hearing
2 required under ORS 215.416(11), and the person subsequently
3 obtains actual notice of the decision, may that person
4 appeal the county's decision directly to LUBA under
5 ORS 197.830(3), or must the de novo local appeal required by
6 ORS 215.416(11) first be exhausted, as provided by
7 ORS 197.825(2)(a)? In the situation presented by this
8 appeal, we believe these statutory provisions can be
9 interpreted in a consistent manner that gives effect to each
10 provision.

11 We have previously interpreted ORS 197.830(3) to apply
12 where "a local government is required to provide a hearing
13 under state or local law, but fails to do so." Beveled
14 Edge, 28 Or LUBA at 792; Leonard v. Union County, 24 Or LUBA
15 362, 374 (1992). We have also construed the phrase "without
16 providing a hearing" in ORS 197.830(3) to include
17 circumstances where the local government either (1) fails to
18 hold a required hearing; or (2) fails to give a person the
19 individual notice of hearing to which they are entitled
20 under state or local law, thereby denying that person the
21 opportunity to appear at the hearing. Id.; cf. Flowers v.
22 Klamath County, 98 Or App 384, 388, 780 P2d 227, rev den 308
23 Or 592 (1989) (local government may not rely on its own
24 "failure to provide notice and a hearing to defeat
25 petitioners' ability to achieve standing to challenge the
26 failure to provide them"). We have also described the

1 purpose of ORS 197.830(3) as protecting the "statutory
2 rights of the individual to receive adequate notice of the
3 public hearing, participate fully in the public hearing and
4 challenge the local decision * * *." Kevedy, 28 Or LUBA
5 at 232.

6 While ORS 215.416(11) allows a county to make land use
7 permit decisions without a hearing, it protects an
8 individual's right to participate in a local hearing, by
9 requiring that notice of the decision be given to affected
10 persons and that the opportunity for a de novo local appeal
11 be provided. Where such a local appeal is available, the
12 purpose of the exhaustion requirement of ORS 197.825(2)(a)
13 is to assure that the challenged decision is reviewed by the
14 highest level local decision making body the local code
15 makes available, before an appeal to LUBA is pursued. Moody
16 v. Deschutes County, 22 Or LUBA 567, 569 (1992); McConnell
17 v. City of West Linn, 17 Or LUBA 502 (1989).

18 Reading these provisions together, we conclude that
19 where a local government makes a permit decision without a
20 hearing, pursuant to local procedures implementing
21 ORS 215.416(11) or 227.175(10), ORS 197.830(3) does not
22 apply, because the local government did not fail to provide
23 a hearing or the notice of such hearing required by state or
24 local law. However, under ORS 215.416(11) and 227.175(10),
25 the local government must provide the opportunity for
26 individuals to obtain a hearing through a de novo local

1 appeal, as required by those statutes. If the local
2 government fails to provide the notice of decision required
3 by ORS 215.416(11) or 227.175(10), it cannot rely on that
4 failure to prevent it from providing the opportunity for a
5 de novo local appeal required by statute. Therefore, in
6 such a situation, the time for filing a local appeal does
7 not begin to run until a local appellant is provided the
8 notice of decision to which he or she is entitled.⁶ Because
9 a local appeal is available to such an individual, under
10 ORS 197.825(2)(a) that appeal must be exhausted before
11 appealing to LUBA.

12 In this case, there is no dispute the planning director
13 made initial decisions on the disputed permits without a
14 hearing, under code provisions implementing ORS 215.416(11).
15 Therefore, ORS 197.830(3) does not apply to allow petitioner
16 to appeal the planning director's decisions directly to this
17 Board. Furthermore, under ORS 215.416(11), the county is
18 required to provide petitioner with notice of the planning
19 director's decisions and the opportunity for a de novo local

⁶We realize that under ORS 197.829, Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994), and Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992), a local governing body has a great deal of discretion in interpreting its own enactments. However, we do not believe that discretion would extend to interpreting code local appeal provisions implementing ORS 215.416(11) or 227.175(10) in a way that would deprive the local government of authority to accept a local appeal where the local government is required by statute to provide such a local appeal, after giving proper notice of its initial decision. Such an interpretation would be contrary to a state statute that the code provisions implement and, therefore, subject to reversal by this Board. ORS 197.829(4).

1 appeal. Consequently, under ORS 197.825(2)(a), we lack
2 jurisdiction to review the challenged decisions, because
3 petitioner must exhaust the available local appeal process.

4 The county's motion to dismiss is granted.

5 This appeal is dismissed.