

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the decision of the Marion County
4 board of commissioners not to hear his appeal because it was
5 not timely filed.

6 **FACTS**

7 Petitioner applied to the county for conditional use
8 approval to expand a storage facility. On July 15, 1994,
9 the county hearings officer approved the application in part
10 and denied it in part. The county requires that a notice of
11 appeal of a hearings officer's decision be filed within 10
12 days of mailing of the decision. Petitioner delivered a
13 notice of appeal of the hearings officer's decision to the
14 county on July 28, 1994, the tenth day after the decision
15 was mailed. The appeal document is stamped as received by
16 the county at 5:05 p.m.¹

17 The county construes its ordinance to require filing an
18 appeal before 5:00 p.m. on the last day of the appeal
19 period. The notice of appeal rights at the end of the
20 hearings officer's order set forth the requirement that

¹Petitioner disputes the facts pertaining to submission of the appeal after the 5:00 p.m. deadline. In our order dated December 21, 1994, we denied petitioner's motion to supplement the record, because the statement petitioner wished to add to the record was not placed before the decision maker. Petitioner's factual dispute is apparently based on a procedural irregularity, as the term is used in OAR 661-10-045(1), which states the grounds for an evidentiary hearing. However, petitioner did not make a motion for an evidentiary hearing, as allowed under OAR 661-10-045(2). In the absence of any evidence, we cannot resolve the factual dispute.

1 "(a)n appeal must be filed with the Marion County Clerk by
2 5:00 p.m. on the 28th day of July, 1995."

3 At a public meeting, the county commissioners
4 considered the petition to appeal. The county determined
5 that the local appeal was not filed in a timely manner and
6 declined to consider it. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner contends that the county commissioners have
9 no authority to reject his local appeal. He contends that
10 in deciding appeals, the county commissioners are limited to
11 pursuing one of three courses of action set forth in MCZO
12 122.120(c): remanding; denying the appeal after
13 consideration of the record; or scheduling a hearing on the
14 appeal.¹

15 The county responds that the county commissioners
16 cannot take action under MCZO 122.120(c) until an effective
17 appeal has been filed under MCZO 122.120(a). The county

¹MCZO 122.120(c) provides in relevant part:

"The Governing Body shall review the action of the Planning Commission or Hearings Officer and may refer the matter back to the Planning Commission or Hearings Officer for further consideration, in which case the Planning Commission or Hearings Officer shall conduct further investigation if it is deemed advisable and report its findings to the Governing Body. The Governing Body may summarily, after considering the application and appeal and finding that the facts therein stated do not warrant any further hearing, affirm the action of the Planning Commission or Hearings Officer and deny the appeal. If the Governing Body be of the opinion that the facts in the case warrant further action, the Governing Body shall set the matter for hearing before the Governing Body and shall give notice of the time and place of such hearing * * *."

1 contends that the appeal period ended at 5:00 p.m. on the
2 tenth day after the notice of the hearing's officer's
3 decision was mailed and that the notice of appeal stamped
4 after 5:00 p.m. on that day is, therefore, not an effective
5 appeal.

6 MCZO 122.120(a) provides in relevant part:

7 "An appeal must be filed with the County
8 Clerk within 10 days from the date of mailing
9 of notice of the decision of the Planning
10 Commission or Hearings Officer."

11 ORS 215.422(1)(a) provides that "[t]he procedure
12 and type of hearing for * * * an appeal or review shall be
13 prescribed by the governing body * * *." The county
14 strictly enforces its requirement that a notice of appeal be
15 filed prior to the expiration of the appeal period. The
16 appeal period ended at 5:00 p.m.² If an appeal to the
17 county commissioners is not filed until after the appeal
18 period has expired, the county is not required by the MCZO
19 to initiate a proceeding to implement any of the three
20 courses of action described in MCZO 122.120(c). See Zarkoff
21 v. Marion County, 14 Or LUBA 61 (1985).

22 The first assignment of error is denied.

23 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

24 Petitioner contends that he was entitled to notice of

²Petitioner does not assign as error the county's determination that the deadline for appeals is the 5:00 p.m. deadline set forth in the hearings officer's notice of decision.

1 the meeting of the board of county commissioners at which
2 the commissioners denied consideration of his appeal.
3 Petitioner contends further that the county commissioners'
4 discussion of his appeal with staff at a public meeting and
5 their subsequent denial of his appeal transformed the public
6 meeting into a quasi-judicial proceeding, for which the
7 county must provide the procedural protections of a quasi-
8 judicial hearing. Finally petitioner contends that the
9 county violated his due process rights under the Fourteenth
10 Amendment to the United States Constitution by denying him
11 an opportunity to be heard at a meaningful time and in a
12 meaningful manner.

13 The county responds that the discussion at the public
14 meeting did not address the merits of the appeal petition,
15 merely procedural matters pertaining to the time the
16 petition was submitted.

17 We have stated on several occasions that discussions
18 between the local government decision maker and legal and
19 planning staff do not constitute ex parte contacts requiring
20 the local government to provide an opportunity for rebuttal.
21 See McInnis v. City of Portland, 25 Or LUBA 376, 380-82
22 (1993), Toth v. Curry County, 22 Or LUBA 488, 490-91 (1991).
23 We agree with the county that the commissioners' public
24 discussion with staff of petitioner's untimely appeal was
25 not a quasi-judicial hearing requiring notice as set forth
26 in MCZO 122.120(c). Furthermore, due process does not

1 require individual notice of the public meeting at which
2 consideration of a petitioner's appeal is denied. Prow v.
3 Marion County, 12 Or LUBA 99 (1984).

4 The second and third assignments of error are denied.

5 The county's decision is affirmed.