

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

3
4 STEVE BENNETT and KATHY BENNETT,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 POLK COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 DALTON ROCK,)
17)
18 Intervenor-Respondent.)

LUBA No. 95-232
FINAL OPINION
AND ORDER

19
20
21 Appeal from Polk County.

22
23 Edward J. Sullivan, Portland, represented petitioners.

24
25 David Doyle, County Counsel, represented respondent.

26
27 Wallace W. Lien, Salem, represented intervenor-
28 respondent.

29
30 GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA,
31 Referee, participated in the decision.

32
33 DISMISSED 01/26/96

34
35 You are entitled to judicial review of this Order.
36 Judicial review is governed by the provisions of ORS
37 197.850.

1 Opinion by Gustafson.

2 **FACTS**

3 On August 3, 1994 the county adopted Ordinance 94-15,
4 which approved an application by John and Brian Dalton and
5 the Dalton Rock Quarry to amend the county's Comprehensive
6 Plan Inventory of Significant Mineral Aggregate Resources,
7 and to apply the Mineral and Aggregate Overlay Zone. That
8 approval was not appealed.

9 According to petitioners' notice of intent to appeal,
10 on October 30, 1995, the county counsel sent a letter to
11 petitioner's counsel, stating that Dalton Rock complied with
12 Ordinance 94-15.¹ Petitioners appeal that letter.

13 **MOTION TO DISMISS**

14 On December 8, 1995, the county moved to dismiss this
15 appeal because it is an untimely filed collateral attack on
16 the county's approval of Dalton Rock's land use application.

17 Petitioners do not respond to the motion to dismiss or
18 otherwise attempt to explain how the letter from the county
19 counsel to petitioner's attorney regarding Dalton Rock's
20 compliance with an earlier land use approval constitutes a

¹The first paragraph of the notice of appeal states:

"Notice is hereby given that petitioners intend to appeal that land use decision of respondent regarding determination of compliance of the Dalton Quarry with Polk County Ordinance 94-15, which became final on October 30, 1995. The challenged decision was issued in the form of a letter from respondent's counsel to petitioner's counsel and which involves a determination that the Dalton Quarry complies with all applicable provisions of Polk County Ordinance 94-15." Notice of Intent to Appeal 1.

1 land use decision.²

2 A local government decision is a land use decision
3 subject to LUBA's jurisdiction if it meets either (1) the
4 statutory definition in ORS 197.015(10); or (2) the
5 significant impact test. The county's motion raises a
6 significant question concerning our jurisdiction to which
7 petitioners have not responded. On the face of the notice
8 of intent to appeal, the challenged letter appears to meet
9 neither the statutory nor significant impact test. Rather,
10 it appears to be a collateral challenge to the county's 1994
11 approval of intervenor's application.

12 Petitioners bear the burden to establish our
13 jurisdiction and have not done so. Billington v. Polk
14 County, 299 Or 471, 703 P2d 232 (1985); Kezar v. Clackamas
15 County, 26 Or LUBA 16 (1993).

16 Petitioners' appeal is dismissed.

²OAR 661-10-065 requires that answers to motions be filed with this Board within 10 days of receipt of the motion.