

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 C. W. FLETCHER and BEVERLY)
5 FLETCHER,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 DOUGLAS COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 RIVERS WEST DEVELOPMENT, INC.,)
18)
19 Intervenor-Respondent.)

LUBA No. 95-198

FINAL OPINION
AND ORDER

20
21
22 Appeal from Douglas County.

23
24 Stephen Mountainspring, filed the petition for review
25 and argued on behalf of petitioners. With him on the brief
26 was Dole, Coalwell & Clark.

27
28 Paul E. Meyer, Assistant County Counsel, Roseburg,
29 filed a response brief and argued on behalf of Douglas
30 County.

31
32 Charles Lee, Roseburg, filed a response brief and
33 argued on behalf of intervenor-respondent.

34
35 HANNA, Referee; GUSTAFSON, Referee, participated in the
36 decision.

37
38 LIVINGSTON, Chief Referee, dissenting.

39
40 AFFIRMED 05/28/96

41
42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's rejection of their
4 appeal of an administrative decision.

5 **MOTION TO INTERVENE**

6 Rivers West Development, Inc., the applicant below
7 (intervenor), moves to intervene in this appeal proceeding
8 on the side of respondent. There is no opposition to the
9 motion, and it is allowed.

10 **FACTS**

11 Intervenors applied for a conditional use permit to
12 establish a campground on a 24.63-acre parcel in the (FF)
13 Farm Forest Zone. The county gave notice of the application
14 as required by Land Use and Development Ordinance (LUDO)
15 2.065, including notice to petitioners. Petitioners
16 responded, through their attorney, by objecting to the
17 application and requesting that the county "send a copy of
18 any notice of public hearing or other proceeding in this
19 matter to" their attorney. Record 9.¹

20 The county approved the application on July 11, 1995.
21 The county mailed notice of its decision to petitioners, as
22 required by LUDO 2.130, but not to their attorney. The
23 county acknowledges that it ordinarily complies with

¹The attorney's three-page letter of objection concluded: "We further request notification of any administrative action taken so that we might perfect our appeal." Record 8.

1 requests to notify an attorney, but that it inadvertently
2 overlooked petitioners' request in this case.

3 The notice sent to petitioners contained information
4 on how to file an appeal to the planning commission,
5 including the requirement in LUDO 2.130(3) that local
6 appeals of administrative decisions be filed within 10 days
7 of that decision. Petitioners received their copy of the
8 notice of approval after returning from a vacation.
9 Petitioners filed an appeal on August 11, 1995. On August
10 30, 1995, the county rejected petitioners' appeal as
11 untimely. Petitioners appeal that rejection.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioners argue that the county erred when it failed
14 to provide notice of its administrative decision to their
15 attorney as requested by petitioners.

16 The county responds that is not obligated to provide
17 notice as requested by petitioners, but only as required by
18 LUDO 2.065 and 2.130.²

²The notice of hearing and notice of decision requirements of the LUDO
are modeled on those of ORS 197.763 and 215.416. LUDO 2.065(3) provides:

"Notice of administrative decision * * * shall be sent by the
director to all property owners within one hundred (100) feet
of the property subject to the application and the appropriate
PAC at least fifteen (15) days prior to a decision. Except
that notice shall be sent to property owners within 500 feet of
the property subject to the application if the property is
within a farm or forest zone."

LUDO 2.065(9) provides:

1 The county provided notice of its decision following
2 procedures set forth in LUDO 2.065(3) and (9). Those LUDO
3 provisions require that notice of an administrative decision
4 be sent to property owners at the address in the records of
5 the county assessor's office. They do not require that
6 notice be sent to a property-owner's representative or in a
7 manner requested by a property owner.

8 However, that determination does not end our inquiry.
9 We must determine: (1) if the county met the "good faith"
10 requirement of LUDO 2.065(9); and (2) whether when a local
11 government meets the notice requirements of its ordinance
12 and the statute and that notice is insufficient to alert a
13 petitioner of a land use decision, there are other notice
14 requirements arising from general principles of case law
15 that the local government must meet.

16 "Good faith" is not defined in the LUDO nor is it
17 defined in the Oregon Revised Statutes in the chapters
18 pertaining to land use, ORS chapters 92, 195, 197, 215 and
19 227. LUBA's sole venture into establishing "good faith" was

"The records of the Douglas County Assessor's office shall be used for notice required by this ordinance. * * * The failure of a property owner to receive notice shall not invalidate the action if a good-faith attempt was made to notify all persons entitled to notice. * * *"

LUDO 2.130(2)(e) provides:

"Notice that any persons who would have had a right to notice if a hearing had been scheduled may appeal the decision within ten days from the date such notice was sent by filing a timely statement with the Director."

1 in Schatz v. City of Jacksonville, 21 Or LUBA 214, 226
2 (1991), in which we found that the city demonstrated "good
3 faith" when it developed a program in an effort to begin to
4 solve problems that led to the city's imposition of a
5 moratorium. However, in that case we provided no analysis
6 of the meaning of the term "good faith."

7 "Good faith" is statutorily defined in contexts other
8 than land use as follows:

9 "'Good faith'" means honesty in fact in the
10 conduct or transaction concerned." ORS
11 71.2010(19).

12 "'Good faith'" means honesty in fact and the
13 observance of reasonable commercial standards of
14 fair dealing." ORS 73.103(1)(d) and
15 74A.105(1)(f).

16 "'Good faith'" means honesty in fact in the
17 conduct of the transaction concerned." ORS
18 90.100(5).

19 Blacks Law Dictionary 623 (5th ed 1979),
20 defines "good faith":

21 "Good faith is an intangible and abstract quality
22 with no technical meaning or statutory definition,
23 and it encompasses, among other things, an honest
24 belief, the absence of malice and the absence of
25 design to defraud or to seek an unconscionable
26 advantage, and an individual's personal good faith
27 is concept of his own mind and inner spirit and,
28 therefore, may not be conclusively determined by
29 his protestations alone. * * * Honesty of
30 intention, and freedom from knowledge of
31 circumstances which ought to put the holder upon
32 inquiry. An honest intention to abstain from
33 taking any unconscientious advantage of another,
34 even through technicalities of law, together with
35 absence of all information, notice, or benefit or
36 belief of facts which render transaction

1 unconscientious. In common usage this term is
2 ordinarily used to describe the state of mind
3 denoting honesty of purpose, freedom from
4 intention to defraud, and generally speaking,
5 means faithful to one's duty or obligation."
6 (Citations omitted.)

7 The essence of these definitions of "good faith" is a
8 requirement for honesty.

9 The county's action may have been careless. Indeed,
10 the county acknowledges that it overlooked petitioners'
11 request. However, there is no indication in the record or
12 in the accounts of either party to suggest that the county's
13 conduct was deliberate. There is no basis to conclude that
14 the county lacked "good faith" such that it was dishonest.

15 With respect to notice requirements arising from
16 general principles of case law, petitioners rely on League
17 of Women Voters v. Coos County, 82 Or App 673 (679), 729 P2d
18 588 (1986), and Club Wholesale v. City of Salem, 19 Or LUBA
19 576 (1990), as requiring such notice. League of Women
20 Voters held that, for cases to which ORS 215.416(8) applies,
21 the time for appealing is tolled until "written notice of
22 the decision is mailed or delivered personally to the party
23 seeking to appeal." 82 Or App 681. In that case, notice
24 was not provided until eight days after the decision was
25 signed. League of Women Voters stands for the proposition
26 that a local government must meet the requirements of the
27 law for punctually providing notice. It does not require
28 notice in addition to that required by law.

1 Club Wholesale involved the amendment of the city's
2 comprehensive plan map and zoning map, and the notice
3 provisions of ORS 197.615(2)(a). The petitioner, who had
4 appeared at the hearing and requested notice, albeit not
5 using the statutory language, was not provided with any
6 notice of the decision. Again, the general principle
7 requiring notice is that the local government must meet the
8 requirements of the law by providing notice to each person
9 entitled to notice under the law. The general principle
10 does not require that those entitled to notice request
11 notice in the language of the law. More importantly, it
12 does not require the local government to provide notice in
13 addition to that required by the law.

14 The county's past practice of accommodating petitioners
15 by sending notice to their attorneys does not obligate it to
16 this practice or constitute lack of good faith when, through
17 inadvertence, it forgets. Nor does it establish a new
18 notice standard. Under the facts of the case before us, we
19 do not find that the county was obligated to provide notice
20 in addition to that required by ordinance and statute. We
21 cannot create such an obligation where one does not
22 otherwise exist.

23 The first assignment of error is denied.

24 **SECOND ASSIGNMENT OF ERROR**

25 Petitioners contend that the notice of administrative
26 decision mailed by the county was defective because it did

1 not include required language informing petitioners of their
2 right to appeal. As we understand petitioners' objection,
3 they contend that "may appeal the decision" is the exact
4 language required by LUDO 2.130(2)(e) and is not the exact
5 language used in the notice.³ The challenged decision
6 contains a statement indicating that an information sheet
7 for appeal is enclosed with the notice. The information
8 sheet provides detailed information on how to appeal an
9 administrative decision to the planning commission.

10 LUDO 2.130(2)(e) does not require that the notification
11 of the right to appeal be accomplished using any particular
12 language. The county's notice of the right to appeal meets
13 the requirements of LUDO 2.130(2)(e).

14 The second assignment of error is denied.

15 **MOTION FOR EVIDENTIARY HEARING**

16 In the event we were to decide under the second
17 assignment of error that the county did not provide notice
18 in the manner required by LUDO 2.130(2)(e), petitioners
19 submitted a motion for an evidentiary hearing to establish
20 that petitioners are prejudiced by this defect because they
21 would have appealed the decision if they had been aware of
22 it. Our resolution of the second assignment of error
23 renders an evidentiary hearing unnecessary.

24 Petitioners' motion for an evidentiary hearing is

³LUDO 2.130(2)(e) is set forth in full in note 1.

1 denied.

2 The county's decision is affirmed.

3 Livingston, Chief Referee, dissenting.

4 I disagree with the majority's view that by sending
5 notice of its decision to petitioners' address, as shown by
6 the records of the county assessor, the county discharged
7 its obligation to give notice to petitioners under LUDO
8 2.065.

9 Under LUDO 2.065(3), petitioners were entitled to
10 notice of the decision. LUDO 2.065(9) provides that the
11 records of the assessor's office "shall be used for notice
12 required by this ordinance."⁴ However, it also states that
13 "the failure of a property owner to receive notice shall not
14 invalidate the action if a good-faith attempt was made to

⁴This provision is similar to ORS 197.763(2)(a), although the statute does not have a good faith requirement. ORS 197.763(2)(a), which is made applicable by ORS 215.416(11)(a), provides, in relevant part:

"Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located

** * * * *

"(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone."

ORS 197.763(2)(a) does not require the notice actually be sent to the address shown on the most recent property tax assessment roll, but only to the owners shown on that roll. If the owners notify the county of a different address, nothing in the statute requires the county to send the notice to the old address, and nothing justifies the county's failure to send the notice to the new address.

1 notify all persons entitled to notice." (Emphasis added.)

2 Upon hearing of the pending application for a
3 conditional use permit, petitioners hired an attorney, who
4 sent a letter addressed to the appropriate county planner,
5 stating various objections to the proposed conditional use
6 permit and concluding:

7 "We request a meeting with the staff and a hearing
8 before the Planning Commission. We further
9 request notification of any administrative action
10 taken so we might perfect our appeal.

11 "We have attached a letter authorizing us to
12 appear on behalf of Dr. and Mrs. Fletcher."
13 Record 8, 30.

14 The attached letter, signed by both petitioners,
15 states:

16 "C.W. Fletcher and Beverly Fletcher, husband and
17 wife, property owners of record within 500 feet of
18 the property described in the above-referenced
19 land use action, hereby employ the law firm * * *
20 on our behalf to object and remonstrate against
21 the proposal for conditional use permit filed as
22 your file no. 95-116.

23 "Please send any copy of any notice of public
24 hearing or other proceedings in this matter to
25 [attorney at attorney's address]." Record 9, 31.

26 In short, petitioners filed a formal request to change
27 their address for notice purposes. They asked nothing more
28 than that the county send the usual notice to the new
29 address rather than to the old address. Nevertheless, the
30 county sent the requested notice not to the new address, but
31 to the address shown on the assessor's records. It is
32 undisputed that doing so deviated from the county's

1 customary practice.

2 The LUDO does not specify what operational standards
3 apply generally to distinguish good faith from bad faith in
4 the context of the county's obligation to give notice. The
5 majority relies in part on definitions found in the Uniform
6 Commercial Code, codified at ORS 71.2010(19) and (with
7 respect to commercial paper and funds transfers) at ORS
8 73.103(1)(d) and 74A.105(1)(f); and a definition found in
9 the residential landlord and tenant statutes at ORS
10 90.100(4). The majority also quotes from a definition of
11 "good faith" from Blacks Law Dictionary, but ignores the
12 provisions that apply here:

13 * * * Honesty of intention, and freedom from
14 knowledge of circumstances which ought to put the
15 holder upon inquiry. An honest intention to
16 abstain from taking any unconscientious advantage
17 of another, even through technicalities of law,
18 together with absence of all information, notice,
19 or benefit or belief of facts which render
20 transaction unconscientious. * * * (Emphasis
21 added.)

22 We need not find actual dishonesty to find the county failed
23 to act in good faith.

24 The context of the statutory definitions is not that of
25 land use, where in most cases, people with normal
26 expectations and little experience are dealing with local
27 governments that have far more information, sophistication

1 and power.⁵ As the Court of Appeals stated in League of
2 Women Voters, supra, 82 Or App at 679:

3 "In the land use context, the county is the
4 deciding body as well as the recordkeeper.
5 Counties are always nominally, and are often in
6 fact, adverse parties to the appellant in appeals
7 to LUBA from their decisions. The peculiar
8 ability of county officials to know whether and
9 when a decision has been made and where it can be
10 found, together with their interest in the
11 decision, makes their statutory duty to give
12 notice of the decision almost fiduciary in
13 nature." (Emphasis added.)

14 Another definition of "good faith" that may apply to
15 local governments and the obligation to give notice is found
16 in the common law of contracts. It is based on a common
17 understanding of the phrase:

18 "The phrase 'good faith' is used in a variety of
19 contexts, and its meaning varies somewhat with the
20 context. Good faith performance or enforcement of
21 a contract emphasizes faithfulness to an agreed
22 common purpose and consistency with the justified
23 expectations of the other party; it excludes a
24 variety of types of conduct characterized as
25 involving 'bad faith' because they violate
26 community standards of decency, fairness or
27 reasonableness." Restatement (Second) of
28 Contracts § 205, comment a (1979).

29 Good faith can be contrasted with bad faith:

30 "Subterfuges and evasions violate the obligation
31 of good faith in performance even though the actor
32 believes his conduct to be justified. But the
33 obligation goes further; bad faith may be overt or

⁵Moreover, the definition of "good faith" in ORS 73.103(1)(d) and 74A.105(1)(f) requires both "honesty in fact" and "the observance of reasonable commercial standards of fair dealing."

1 may consist of inaction, and fair dealing may
2 require more than honesty. A complete catalogue
3 of types of bad faith is impossible, but the
4 following types are among those which have been
5 recognized in judicial decisions: evasion of the
6 spirit of the bargain, lack of diligence and
7 slacking off, willful rendering of imperfect
8 performance, abuse of power to specify terms, and
9 interference with or failure to cooperate in the
10 other party's performance." Restatement (Second)
11 of Contracts, § 205, comment d (1979).

12 See also Best v. U.S. National Bank, 303 Or 557, 562-64, 739
13 P2d 554 (1987).

14 I interpret the good faith condition in the third
15 sentence of LUDO 2.065(9) to demand more than mechanical
16 compliance with the default notice procedure stated in the
17 first sentence. The county is in basic agreement with that
18 interpretation, as shown by its usual practice of
19 accommodating change of address requests.

20 On the facts presented in this appeal, the county did
21 not make a good faith attempt to give notice to petitioners.
22 It did not effectuate the reasonable expectations of
23 petitioners.⁶ Its failure to give petitioners notice at the
24 requested address and its failure to rectify its error shows
25 an unacceptable lack of diligence and of cooperation with

⁶Since the petitioners are frequent travelers, they acted reasonably in hiring an attorney to act as their representative. The majority's reasoning would leave petitioners in the position of either not traveling at all, forwarding all of their mail to their attorney, or hiring someone to inspect their mail for letters from the county. A local ordinance should not be interpreted to impose such unreasonable burdens, when the alternative -- modifying the county's mailing list -- is so easy.

1 petitioners in the land use process. I would remand to give
2 petitioners the opportunity to appeal the county's
3 administrative decision to the planning commission.

4 I respectfully dissent.