

AUG 7 3 57 PM '87

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

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2  
3 GENE C. COPE, KEITH KRUCHEK )  
4 and LYLE G. WELLS, )  
5 Petitioners, )  
6 vs. )  
7 THE CITY OF CANNON BEACH, )  
8 Respondent. )

LUBA No. 87-023

FINAL OPINION  
AND ORDER

9 Appeal from the City of Cannon Beach.

10 Kenneth M. Elliott, Portland, filed a petition for review  
11 and argued on behalf of petitioners. With him on the brief  
were O'Donnell, Ramis, Elliott & Crew.

12 Corinne C. Sherton, Salem, filed a response brief and  
13 argued on behalf of Respondent City of Cannon Beach.

14 Philip L. Nelson, Astoria, filed a response brief and  
argued on behalf of Respondent-Applicant Harold C. Wall.

15 DuBAY, Chief Referee; BAGG, Referee; HOLSTUN, Referee;  
16 participated in the decision.

17 DISMISSED 08/07/87

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

1 Opinion by DuBay.

2 NATURE OF DECISION

3 The appeal challenges a decision reducing the minimum lot  
4 size requirements for five lots from 10,000 square feet to  
5 5,000 square feet.

6 FACTS

7 The planning commission approved the exception to the  
8 minimum lot size requirements on August 23, 1984. Notice of  
9 the planning commission's meeting was given by posting the  
10 agenda which included a line item for the lot size reduction  
11 request. No notice of the meeting was mailed to property  
12 owners in the area. The planning commission held no public  
13 hearing before approving the exception.

14 When the lot size exception was approved, the applicant was  
15 informed that no building permits would be issued for two of  
16 the lots without a variance from access requirements in the  
17 zoning ordinance. The applicant requested the variances in  
18 October, 1986. When the planning commission took up the  
19 request, it considered petitioners' request to reconsider the  
20 lot size reduction decision made in 1984. The planning  
21 commission's order of December 23, 1986, denied the request to  
22 reconsider the 1984 decision and approved the requested  
23 variances.

24 Petitioners appealed the planning commission's decision to  
25 the city council. The council held a hearing on the record  
26 made before the planning commission and denied the appeal,

1 affirming the variance approvals. The order also affirmed the  
2 city's intention not to reconsider the 1984 lot size decision.

3 This appeal followed.<sup>1</sup>

4 FIRST ASSIGNMENT OF ERROR

5 Petitioners allege the 1984 decision is invalid. They  
6 contend the city failed to follow procedures prescribed in the  
7 ordinance for granting variances from ordinance requirements  
8 when the lot size reduction was approved. According to their  
9 argument, the only procedure prescribed in the ordinance for  
10 lot size reductions are the procedures for variances in Chapter  
11 8 of the zoning ordinance. According to petitioners, the city  
12 failed to apply the variance criteria and also failed to follow  
13 the procedures applicable to variances set forth in Chapter 8  
14 of the zoning ordinance. The procedures include mailing notice  
15 of hearings to owners of property within 100 feet of the  
16 property at issue. Sec. 10.020, Cannon Beach Zoning  
17 Ordinance.

18 The city contends petitioners may not appeal the 1984  
19 decision to this Board. For the reasons set forth below, we  
20 agree with the city and dismiss the appeal.

21 The city argues that the appeal to LUBA was not filed  
22 within the 21 day period prescribed by ORS 197.830(7). The  
23 city recognizes that no notices of of the 1984 planning  
24 commission decision were given to petitioners at the time the  
25 decision was rendered.

26 Petitioners concede that variances are permits as defined

1 in ORS 227.160(2) and that the court's reasoning in League of  
2 Women Voters v. Coos County, 82 Or App 673, \_\_\_ P2d \_\_\_ (1986)  
3 likely applies to the variance. In League of Women Voters,  
4 supra, the court said the time to appeal county permit decision  
5 subject to LUBA's review begins only after required notice is  
6 given to the party seeking appeal. We agree with petitioners'  
7 assessment. The city contends, however, that notice of the  
8 1984 decision was given to petitioners in a December 10, 1986,  
9 letter to petitioners' attorney. Record at 149. The city  
10 argues the appeal to LUBA was filed more than 21 days after  
11 December 10, 1986.

12 We agree with respondent that the December 10th letter was  
13 written notice to petitioners of the 1984 decision by the  
14 planning commission.

15 As we noted in Harris v. City of Happy Valley, 13 Or LUBA  
16 113, 116 (1985), ORS 227.173(3) does not specify the kind of  
17 written notice which must be given to parties to the  
18 proceeding.<sup>2</sup> The December 10 letter was from the city  
19 manager to petitioners' attorney. The letter states the  
20 position of the city manager that "no further public hearing or  
21 reconsideration should occur regarding the 1984 Wall Lot Size  
22 Reduction." The letter is the first written document given to  
23 petitioners that mentions the approval of the lot size  
24 reduction decision made in August 1, 1984. The letter was  
25 adequate to inform petitioners that the decision was made in  
26 1984 approving the lot size reduction.<sup>3</sup>

1       The letter, however, did not start the period for an appeal  
2 to LUBA. At that point the only available appeal procedure was  
3 an appeal to the city council according to CBZO 10.080(2).<sup>4</sup>  
4 An appeal to LUBA without first pursuing the available appeals  
5 under the local ordinance would have been premature. Lyke v.  
6 Lane County, 70 Or App 82, 688 P2d 411 (1984).

7       Petitioners did not appeal the planning commission's 1984  
8 decision to the city council. Instead, they continued request  
9 that the planning commission reconsider the 1984 approval of  
10 the lot size reduction, even though the city code has no  
11 provision for reconsideration of prior decisions. After the  
12 planning commission refused to reconsider its prior decision,  
13 petitioners appealed the planning commission's December 29,  
14 1986, decision to the city council. Although petitioners'  
15 notice of appeal to the council cited the invalidity of the  
16 1984 decision as one of the grounds for the appeal, the notice  
17 clearly states the variance approval was the subject of the  
18 appeal.<sup>5</sup>

19       In addition to the failure to specify the 1984 decision in  
20 the notice of appeal to the city council, there is another  
21 reason for our view that 1984 decision became final and not  
22 subject to further appeal. The city code provides that appeals  
23 of planning commission decisions are perfected by filing a  
24 notice of intent to appeal within 20 days of notice of the  
25 decision. CBZO Sec. 10.080(2). The December 10th letter above  
26 referred to was written notice of the decision and began the

1 period to file an appeal to the council. The appeal period  
2 expired 20 days later, on December 30th. Petitioners filed no  
3 appeal within the 20 day period. The appeal of the variance  
4 approval, even assuming the notice of appeal included an appeal  
5 of the lot size decision, was not filed until January 12.

6 Because the 1984 decision of the planning commission was  
7 not appealed to the city council within the time prescribed in  
8 the ordinance, petitioners may not appeal that decision to  
9 LUBA. Lyke v. Lane County, supra.

10 Accordingly, the appeal is dismissed.

FOOTNOTES

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4 In addition to this appeal of the lot size decision,  
5 petitioners also filed an appeal of the city's final decision  
6 approving the variances. See LUBA No. 87-022.

7 2  
8 The zoning ordinance does not require written notice to  
9 anyone but the applicant. CBZO Sec. 10.073. The requirement  
10 for notice of the decision is in ORS 227.173(3) regarding  
11 decisions for permits defined in ORS 227.160(2) as  
12 discretionary approvals of a proposed development of land under  
13 city legislation or regulation.

14 3  
15 The record shows petitioners had actual notice of the 1984  
16 decision prior to December 10, 1986. Petitioner Kruchek wrote  
17 a letter to the planning commission on October 21, 1986,  
18 objecting to lack of notice of hearing "when the city reduced  
19 the required lot size." Record at 167. On November 13, 1986,  
20 petitioners' attorney wrote letter to the planning commission  
21 alleging several defects in the 1984 decision process. Record  
22 at 156. For the reasons set forth above, it is not necessary  
23 to address whether and when petitioners received actual notice  
24 of the decision prior to the December 10th letter.

25 4  
26 CBZO Sec. 10.080 states:

"2. A decision of the Planning Commission may be  
appealed to the City Council by an affected party  
by filing an appeal within twenty (20) days of  
notice of the decision. The notice of appeal  
shall indicate the decision that is being  
appealed."

27 5  
28 The notice of appeal to the city council states:

"A. The decision sought to be reviewed: The decision  
of the Planning Commission granting an  
application for a variance of Harold and Hazel  
Wall for a variance in an RL zone to allow  
development of two lots that do not currently

1 possess 25 feet of access on a public right of way.  
2 The decision was dated December 29, 1986 and more  
3 fully set forth in Order No. 86-30." Record at 114.  
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