

LAND USE
BOARD OF APPEALS
Nov 8 1 32 PM '89

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

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ROBERT L. COATS,)
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Petitioner,)
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vs.)
)
CROOK COUNTY,)
)
Respondent,)
)
and)
)
MELVIN WEBERG & CO.,)
)
Intervenor-Respondent.)

LUBA No. 88-122
FINAL OPINION
AND ORDER

Appeal from Crook County.

Frank M. Parisi, Portland, represented petitioner.

Thomas N. Corr, Prineville, represented respondent.

Robert L. O'Halloran, Portland, represented intervenor-respondent.

HOLSTUN, Referee; SHERTON, Chief Referee, KELLINGTON, Referee, participated in the decision.

AFFIRMED 11/08/89

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals a Crook County Court (county court)
4 decision dismissing petitioner's appeal of a Crook County
5 Planning Commission (planning commission) decision approving a
6 conditional use permit for a rock quarry.¹

7 FACTS

8 Although some factual disputes exist, the facts material to
9 this case are not in dispute.

10 Crook County Zoning Ordinance (CCZO) 6.060(2) provides:

11 "Before the planning commission may act on a
12 conditional use application, it shall hold a public
hearing thereon, following procedure [sic] as
established in Section 9.050."

13 CCZO Section 9.050 provides as relevant:

14 "(1) Each notice of hearing authorized by this
15 ordinance shall be published in a newspaper of
general circulation in the County at least 10
16 days prior to the date of hearing.

17 "(2) In addition, a notice of hearing on the
18 conditional use * * * shall be mailed to all
owners of property within 250 feet of the
19 property for which the * * * conditional use
* * * has been requested. The notice of hearing
shall be mailed at least 10 days prior to the
date of hearing.

20 "* * * * *"

21 On September 29, 1988, notice was published in the Central
22 Oregonian of a public hearing before the planning commission to
23 be held on October 12, 1988, to consider five conditional use
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25
26 ¹The conditional use permit was issued to intervenor-respondent Melvin
Weberg, & Co.

1 permit applications. One of the five conditional use permit
2 applications was identified in the notice as follows:

3 "Conditional Use Application No. C-CU-404-88 by Melvin
4 Weberg & Co. [Weberg conditional use permit] seeking
5 Commission approval to establish a rock quarry in an
6 EFU-1 Zone (Exclusive Farm Use). * * *" Response to
7 Motion to Dismiss App A.

8 At the October 12, 1988 planning commission hearing, the
9 Weberg conditional use permit was not discussed.² On
10 October 13, 1988, notice was published in the Central Oregonian
11 of a planning commission hearing to consider two conditional use
12 permit applications on October 26, 1988. One of the conditional
13 use permit applications identified in the notice was the Weberg
14 conditional use permit.

15 A hearing was not held on the Weberg conditional use permit
16 on October 26, 1988. In an affidavit, the Crook County Planning
17 Director states:

18 "On October 26, 1988, the duly advertised day for the
19 county planning commission meeting, two items were on
20 the agenda, one of those being [the Weberg conditional
21

22 ²Respondent claims that the planning director announced at the October
23 12 hearing that the Weberg conditional use permit hearing would be held on
24 October 26, 1988 and attaches affidavits to support that claim. Petitioner
25 disputes respondent's claim that the October 26 hearing date was announced
26 at the October 12 hearing and attaches affidavits to support his position.

27 We conclude it does not matter whether the October 26, 1988 hearing date
28 was announced at the October 12, 1988 hearing. As noted below, notice of
29 the October 26, 1988 hearing was subsequently published in the Central
30 Oregonian on October 13, 1988, as required by CCZO 9.050(1). We also note
31 that written notice of the October 26, 1988 hearing was posted on the
32 courthouse door prior to the October 12, 1988 hearing and one of the
33 affidavits submitted by petitioner notes that the affiant, a representative
34 of petitioner, saw the posted notice of the October 26, 1988 hearing.

1 use permit]. At the close of courthouse business
2 during the afternoon, it became apparent that there
3 would be lack of quorum for the evening meeting. Per
4 standard office procedure, all applicants, the media,
as well as any known parties of record at that point
were contacted by phone. The cancellation was
broadcast over a local radio station, K.R.C.O.

5 "Additionally, a written cancellation notice was
6 posted on the City Hall's front door informing the
7 public that the meeting was cancelled due to lack of
quorum and that the items would be heard at the next
regularly scheduled planning commission meeting.³

8 "There was a quorum for the November 9, 1988 meeting
9 and [the Weberg conditional use permit] was approved
at that time. * * *" Affidavit of William P.
Zelenka.

10 Following the November 9, 1988 approval, the planning
11 commission decision was reduced to writing and became final on
12 November 14, 1988, subject to appeal to the county court within
13 15 days as provided by CCZO 9.030.

14 Petitioner's appeal was filed with the county court on
15 December 2, 1988. In a December 7, 1988 order dismissing
16 petitioner's appeal, the county court stated the planning
17 commission's decision was "signed on the 14th of November, 1988,
18 and the last day to take an appeal was the 29th of November,
19 1988." Order Dismissing Appeal 1. The county court concluded
20 petitioner's December 2, 1988 appeal was "untimely and
21 inappropriately filed." Id. at 2. This appeal followed.

22 DECISION

23 Respondent contends petitioner did not appear before the
24

25
26 ³There was no additional published notice of the November 9, 1988
planning commission hearing.

1 planning commission in this matter. Respondent contends that
2 because petitioner did not appear before the planning
3 commission, he does not satisfy the standing requirement of
4 ORS 197.830(3)(b).⁴

5 Respondent also argues that although petitioner appealed
6 the planning commission's decision to the county court, the
7 appeal was filed 18 days after the planning commission decision.
8 Respondent argues that under CCZO 9.030, an appeal of a planning
9 commission decision on a conditional use permit to the county
10 court "must be filed with the county within 15 days after the
11 [planning commission] decision * * *." Respondent contends the
12 county court, therefore, properly dismissed petitioner's
13 untimely appeal of the planning commission's decision and the
14 county court's decision should be affirmed.

15 Petitioner answers that the county's failures to provide
16 (1) proper published public notice of the planning commission
17 hearing, (2) individual notice to petitioner of the planning
18 commission hearing, and (3) notice to petitioner of the planning
19 commission's decision, excuse petitioner's failures (1) to
20 appear during the planning commission proceedings, and (2) to
21 appeal the planning commission decision to the county court
22 within the 15 days provided in CCZO 9.030.

23 In an order denying respondent's motion to dismiss, dated
24 _____

25 ⁴As discussed later in this opinion, ORS 197.830(3)(b) requires in part
26 that a person wishing to appeal a land use decision to LUBA must have
"[a]ppeared before the local government * * *."

1 August 9, 1989, we determined petitioner had not failed to
2 exhaust available remedies under the CCZO because there were no
3 available remedies to exhaust following the county court's
4 decision. However, in that order we did not decide whether
5 petitioner appeared before the local government and, if not,
6 whether the notice errors alleged by petitioner excused
7 petitioner's failure to appear. Neither did we decide whether
8 the county court erroneously dismissed petitioner's notice of
9 appeal of the planning commission decision as untimely filed.⁵

10 Failure to provide required notice to petitioner could
11 provide a basis for excusing the statutory requirement that a
12 person appealing a land use decision to LUBA have appeared
13 during the local proceedings. See Flowers v. Klamath County,
14 98 Or App 384, 389, ___ P2d ___ (1989). Failure to provide
15 petitioner with the required notice also could excuse
16 petitioner's failure to file his notice of appeal of the
17 planning commission decision to the county court within the 15
18 days required under CCZO 9.030. See Pienovi v. City of Canby,
19 ___ Or LUBA ___ (LUBA No. 87-112 and 87-113, April 14, 1988),
20 slip op 5; Dack v. City of Canby, ___ Or LUBA ___ (LUBA No. 88-
21 073, Order on Motion to Dismiss, October 13, 1988), slip op 3-4.
22 Therefore, we first consider below petitioner's arguments (1)

23 _____
24 ⁵Although no record and no petition for review or response briefs have
25 been filed in this proceeding, the parties agree that LUBA should decide
26 these issues based on the memoranda in support of and in opposition to
respondent's motion to dismiss and the evidentiary material attached to
their memoranda.

1 that the required public notice was defective, and (2) that he
2 was entitled to, but did not receive, individual notice.

3 A. Public Notice

4 Respondent argues that the public notice required by
5 CCZO 9.050(1) was provided. That notice was provided, according
6 to respondent, by the October 13, 1988 newspaper publication of
7 notice of the October 26, 1988 planning commission hearing.
8 Although neither petitioner nor his representatives were present
9 for the October 26, 1988 hearing, respondent argues:

10 "had they [been present] they would have been put on
11 notice of the lack of quorum and the continuance of
12 the agenda to the next regularly scheduled planning
13 commission meeting on November 9, 1988."

14 Petitioner argues the failure of the planning commission to
15 achieve a quorum on October 26, 1988 necessitated a new
16 published public notice under CCZO 9.050(1). Petitioner argues
17 that in the absence of a quorum, notice could not properly be
18 given of a planning commission hearing on November 9, 1988 on
19 the Weberg conditional use permit.⁶

20 ⁶Petitioner provides the following language from Roberts Rules of Order
21 in support of his argument:

22 "The term previous notice (or notice) as applied to necessary
23 conditions for the adoption of certain motions, has a
24 particular meaning in parliamentary law. A requirement of
25 previous notice means that announcement that the motion will be
26 introduced -- indicating its exact content as described
below -- must be included in the call of the meeting (P.4) at
which the motion will be brought up, or, as a permissible
alternative in bodies that meet at least quarterly, must be
made at the preceding meeting. The call of the meeting is
generally mailed to all members a reasonable time in advance,
which may be prescribed by the bylaws.

1 Respondent contends it was entirely proper, upon failure to
2 achieve a quorum, to provide notice on October 26, 1988 of the
3 new date for the hearing, and additional published public notice
4 was not required.⁷ In support of its position, the county cites
5 Apalategui v. Washington County, 80 Or App 508, 723 P2d 1021
6 (1986) (Apalategui).

7 There are significant differences between the issue decided
8 in Apalategui and the issue presented in this case. First, in
9 Apalategui there was no question concerning failure of the
10 decision making body to achieve a quorum. The court explained
11 the issue in that case, and its resolution of the issue, as
12 follows:

13 " * * * ORS 215.060 and ORS 215.223 require ten days
14 public notice before each board hearing on a
15 comprehensive plan or a zoning ordinance. The county
16 published two notices which together listed most of
17 the 14 dates on which the Board held hearings on these
18 ordinances. However, the Board held hearings on dates
19 that were not listed in the notices, including the
20 date on which it adopted them. The date of each

21 " * * * * *

22 "The prohibition against transacting business in the absence of
23 a quorum cannot be waived even by unanimous consent, and a
24 notice (P.100) cannot be validly given." (Emphasis in
25 original.) Petitioner's Response to Motion to Dismiss
26 Appendix.

⁷The county cites the following language from Robert's Rules of Order in
support of its position:

27 " * * * Where there is no hope of there being a quorum, * * *
28 then no business can be transacted except simply to adjourn.
29 * * * The unfinished business shall be taken up at the next
30 succeeding session previous to new business, and treated the
31 same as if there had been no adjournment." Respondent's Reply
32 and Affidavits 3.

1 hearing held without published notice was announced at
2 a hearing held pursuant to a published notice or at a
3 hearing which was itself announced at a hearing held
4 pursuant to public notice. We agree with the county's
5 argument that the hearings for which no published
6 notice was given were continuations of the hearings
7 held pursuant to published notice and that the
8 resulting ordinances are not therefore invalid.

9 "An extended hearing process like that in which the
10 county engaged necessarily requires continuances.
11 Testimony may be long and complicated, there may be
12 many persons to testify and the local government may
13 have other matters that it must resolve, necessitating
14 continuances. There is no rule which requires a
15 hearing to proceed continuously without interruption
16 until consideration of the subject for which it was
17 called is finished, simply because the local
18 government has not been able to give ten days
19 published notice of a resumption of the hearing at a
20 later time. The announcement of the continuance at
21 the meeting is sufficient compliance with the
22 statutes." 80 Or App at 514. (Footnotes omitted.)

23 The Court of Appeals' decision in Apalategui makes it clear
24 that had a quorum of the planning commission been present on
25 October 26, 1988, and had the planning commission opened and
26 continued the hearing on the Weberg conditional use permit to
November 9, 1988, the requirement for published public notice of
the planning commission hearing would be satisfied without
separately republishing notice of the November 9, 1988 hearing.

The issue presented in this case is somewhat different. We
do not understand petitioner to dispute that the planning
director did, on October 26, 1988, post on the door of the city
hall where the hearing was to be held notice that the Weberg
conditional use permit would be heard at the next regularly
scheduled planning commission meeting. Neither does petitioner
dispute that the other notifications performed by the planning

1 director, described earlier in this opinion, were given or that
2 petitioner was unable to determine the date of the next
3 regularly scheduled planning commission meeting. Rather,
4 petitioner contends the failure of the planning commission to
5 achieve a quorum made it impossible to proceed further in the
6 Weberg conditional use permit matter without republishing notice
7 in the newspaper to comply with CCZO 9.030.

8 Although both parties cite provisions from Roberts Rules of
9 Order, neither party explains why Roberts Rules of Order is
10 relevant or controlling.⁸ CCZO 9.050(1) and (2) simply require
11 that notice be published and that notice be mailed to those
12 entitled to individual notice. Those provisions are silent
13 about who is to provide the required notice. Although the
14 notice of continuation of a hearing in Apalategui apparently was
15 given by the decision making body during a hearing at which a
16 quorum was present, we can think of no reason why these facts
17 are critical or important, absent some statutory or code
18 provision requiring that continuation notice only be given by
19 the decision maker at a meeting at which a quorum is present.

21 ⁸In addition, we find the provisions the parties cite to be unhelpful.
22 The language cited by petitioner, see n 6, supra, suggests notice of a
23 hearing could not initially be given at a planning commission meeting at
24 which there was no quorum. That is not the situation presented in this
25 case. The language cited by respondent, see n 7, supra, does not clearly
26 support respondent's contention that the October 13, 1988 notice need not
be republished upon the planning commission's failure to achieve a quorum
on October 26, 1988, because the cited language does not appear to address
notice requirements.

1 We understand the principle upon which Apalategui is based to be
2 that where proper published public notice of a hearing is given,
3 and persons who attend that hearing are given adequate notice of
4 a continuation of the hearing to another date, new published
5 public notice is not necessary.⁹

6 We believe it is appropriate to extend that principle to
7 encompass notice provided at the time and place set for a
8 hearing that is adequate to inform those who would have attended
9 the hearing that the hearing is postponed to another date and
10 time. Petitioner does not claim the notice given by the
11 planning director was inadequate to perform that function,¹⁰ and
12 we reject petitioner's contention that the published public
13 notice and the notice given by the planning director in the
14 Weberg conditional use permit proceeding were inadequate to
15
16

17
18 ⁹In this case, the county's decision is an action to approve a
19 conditional use permit. The statutes addressed in Apalategui concern
20 notice of hearings required for ordinances adopting and amending
21 comprehensive plans and zoning regulations, not actions to approve a
22 conditional use permit. However, this difference does not mean the
23 reasoning in Apalategui should not apply in this case as well. The parties
24 apparently agree the conditional use permit granted in this proceeding is a
25 "permit" as that term is defined in ORS 215.402(4). The relevant statutes
26 similarly impose a requirement for notice of a hearing on such a permit
application, or notice of the decision on such a permit application if the
decision is made without a public hearing. ORS 215.416(5) and (11).

¹⁰Petitioner does not contend that the notice the planning director
posted on the front door of city hall was inadequate to advise persons
wishing to attend the hearing that the hearing would be held at the next
planning commission meeting on November 9. Neither does petitioner contend
he failed to receive notice of the November 9 hearing because he was
dissuaded from attending the October 26 meeting due to notice of its
cancellation.

1 comply with CCZO 9.030(1)¹¹.

2 B. Individual Notice

3 Petitioner contends he

4 "should have been given individual notice because he
5 is an 'aggrieved' party and an 'adversely affected'
6 party, within the meaning of ORS 197.830(3).
7 Petitioner's interest in decisions on Goal 5 mineral
8 and aggregate resources is well known to respondent
9 Crook County. Petitioner has intervened in LCDC's
10 periodic review process of the Crook County
11 Comprehensive Plan. * * * Counsel for petitioner
12 objected in writing to the fact that Mr. Weberg, the
13 president of the applicant in this case, was a member
14 of the planning commission and had voted against
15 petitioner's application without disclosing
16 Mr. Weberg's interest in the outcome of the case.
17 * * * Petitioner's own application for a conditional
18 use permit * * * has been the subject of at least six
19 hearings before the planning commission, and is now
20 the subject of LUBA appeal number 88-123. Petitioner
21 argued in that case that the county's plan was out of
22 compliance with respect to all Goal 5 mineral and
23 aggregate resources. Petitioner also owns a quarry in
24 the immediate vicinity of the Weberg pit. * * * It
25 is probably fair to say that, outside of Mr. Weberg

16
17 ¹¹In a footnote in its decision in Apalategui, the Court of Appeals
18 explained:

19 "This case does not involve an original hearing for which
20 notice was published and which was then continued time and
21 again over a period of several months. The two published
22 notices gave most of the dates of which the hearings were
23 actually held. There is no indication that the county
24 attempted to circumvent the statutory requirements." 80 Or App
25 514, n 7.

26 Although this case does involve the original hearing on the conditional
use permit, we are not presented with a situation where there is evidence
that the county was attempting to circumvent statutory or code requirements
through repeated continuations or postponements. There were two
postponements in the hearing on the Weberg conditional use permit.
However, we have no reason to question the county's explanation that the
first postponement was caused by an incomplete application and that the
second postponement was due to lack of a quorum.

1 himself, no one in the entire county is more
2 'aggrieved' or more 'adversely affected' by the
3 decision in the Weberg case than petitioner * * *."
4 Response to Motion to Dismiss 7-8.

5 Respondent answers:

6 "Petitioner's claim that petitioner is an 'adversely
7 affected party' or is an 'aggrieved party' and
8 therefore entitled to individual notice * * * is
9 without merit because it misinterprets and misapplies
10 ORS 197.830(3). The test of 'aggrieved' and
11 'adversely affected' is not to determine who gets
12 notice in the local government process, but is the
13 test to determine who can file a petition before LUBA.
14 * * *" Respondent's Reply and Affidavit 5.

15 ORS 197.830(3) provides:

16 "Except as provided in ORS 197.620(1), a person may
17 petition the board for review of a quasi-judicial land
18 use decision if the person:

19 "(a) Filed a notice of intent to appeal the decision
20 as provided in subsection (1) of this section;

21 "(b) Appeared before the local government, special
22 district or state agency orally or in writing;
23 and

24 "(c) Meets one of the following criteria:

25 "(A) Was entitled as of right to notice and
26 hearing prior to the decision to be
27 reviewed; or

28 "(B) Is aggrieved or has interests adversely
29 affected by the decision."

30 We essentially agree with respondent that the statutory
31 requirements for "adverse affect" and "aggrievement" in
32 ORS 197.830(3)(c)(B) have no direct bearing on who is entitled
33 to individual notice of a local government hearing on a permit
34 application.¹² ORS 215.416(5) requires that before a hearing
35

36 ¹²Of course, if a person is entitled as of right to notice and hearing

1 on a permit application the county must provide "notice to the
2 applicant and also notice to other persons as otherwise provided
3 by law * * *." The only person clearly identified by
4 ORS 215.416(5) as entitled to notice is the applicant. The
5 reference to "persons as otherwise provided by law" creates a
6 potentially larger, less well defined class of persons entitled
7 to notice.¹³ In determining who, other than the applicant, is
8 entitled to notice of a permit hearing, we look first to the
9 CCZO. As we have already explained, the published notice
10 required by CCZO 9.050(1) was given. As far as we can tell,
11 persons owing property within 250 feet of the property for which
12 the conditional use permit was granted also were given the
13 mailed notice required by CCZO 9.050(2). Petitioner apparently
14 does not own land within 250 feet of the property. Petitioner
15 identifies no code, statutory or constitutional provisions that
16 entitle him to individual notice of the hearing on the
17 conditional use permit application.¹⁴ We conclude petitioner

18
19 prior to the appealed decision, that person meets the alternative statutory
20 standing requirement of ORS 197.830(3)(c)(A). We do not understand,
21 however, how satisfying the criterion in ORS 197.830(3)(c)(B) has any
22 bearing on whether the alternative criterion in ORS 197.830(3)(c)(A) is
met. If all persons "adversely affected" or "aggrieved" were also persons
entitled by "right" to receive notice, then the criterion in
ORS 197.830(3)(c)(A) would be superfluous.

23 ¹³We note that ORS 215.416(5) does not impose a requirement that the
24 applicant or the other persons entitled to receive notice are entitled to
any particular type of notice.

25 ¹⁴Similarly, petitioner does not identify any code statutory or
26 constitutional provisions entitling him to individual notice of the
planning commission's decision that might excuse his failure to file a
timely notice of local appeal, and we find none.

1 was not entitled to individual notice of the planning commission
2 hearing.¹⁵

3 C. Conclusion

4 It is not disputed that petitioner failed to appear before
5 the planning commission. However, the decision challenged in
6 this proceeding is not the planning commission's decision, but
7 rather the county court's decision dismissing petitioner's
8 appeal. Petitioner did file a notice of appeal to the county
9 court, although after the 15 day period provided by the CCZO for
10 filing such notices of appeal. While we have some doubt whether
11 an untimely local notice of appeal may in all cases properly be
12 viewed as an "appearance" for satisfying the standing
13 requirement of ORS 197.830(3)(b), we conclude that in this case
14 it did constitute an appearance. We, therefore, conclude
15 petitioner has standing to appeal the county court's decision to
16 this Board.

17 As noted earlier in this opinion, CCZO 9.030 requires that
18 an appeal of the planning commission's decision on a conditional
19 use permit to the county court "must be filed with the county
20 within 15 days after the [planning commission] decision * * *."
21 Petitioner's appeal was filed 18 days after the planning
22 commission's decision, and the county court determined that
23

24
25 ¹⁵Petitioner's general interest in the subject matter is neither
26 sufficient to entitle him to individual notice of all county hearings
affecting that subject matter nor sufficient, by itself, to establish
standing before LUBA as a person aggrieved or adversely affected.

1 because it was not timely filed, petitioner's appeal should be
2 dismissed. Aside from his notice arguments, petitioner cites no
3 constitutional, statutory or CCZO provisions that would require
4 the county court to overlook its 15 day time limit. As
5 discussed supra, we find no defects in the county's notice of
6 the planning commission hearing or decision that would require
7 the county court to accept petitioner's untimely notice of
8 appeal of the planning commission decision.

9 Accordingly, we find the county court properly dismissed
10 petitioner's notice of appeal as not timely filed.

11 The county court's decision is affirmed.