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

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SAVA ZARKOFF,)
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Petitioner,)
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vs.)
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MARION COUNTY,)
)
Respondent.)

LUBA No. 85-030

FINAL OPINION
AND ORDER OF DISMISSAL

SAVA ZARKOFF,)
)
Petitioner,)
)
vs.)
)
MARION COUNTY,)
)
Respondent.)

LUBA No. 85-034

Appeal from Marion County.

J. Michael Alexander, Salem, filed the petition for review and argued the cause on behalf of Petitioner. With him on the brief were Burt, Swanson, Lathen, Alexander & McCann.

Robert C. Cannon, Salem, filed a response brief and argued the cause on behalf of Respondent Marion County.

Robert L. Engle, Woodburn, filed a response brief and argued the cause on behalf of Respondent-Participants Panfil Can and Imbrini Toran. With him on the brief were Eichsteadt, Boland, Engle, Schmidtman & Rohrer.

BAGG, Chief Referee; DUBAY, Referee; KRESSEL, Referee; participated in the decision.

DISMISSED 08/15/85

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals two decisions. The first, LUBA No.
4 85-030, is a decision of the Marion County Hearings Officer to
5 grant a conditional use permit to locate a church on a small
6 parcel in an Exclusive Farm Use Zone.¹ The second, LUBA No.
7 85-034, is an appeal of the Marion County Board of
8 Commissioners' decision refusing to review the same grant.

9 FACTS

10 This matter is before us for the second time. Petitioner
11 appealed a similar land use decision in late 1984. We remanded
12 the decision pursuant to a request filed by Marion County.
13 Zarkoff v. Marion County, ___ Or LUBA ___ (LUBA No. 84-087,
14 January 9, 1985). After the remand, the county board referred
15 the matter back to the hearings officer. The hearings
16 officer's order on the merits was issued on April 3, 1985. Her
17 decision was placed on the county board of commissioners'
18 agenda and announced at the board's regular meeting on April
19 10, 1985.

20 Petitioner filed an appeal from the hearing officer's
21 decision with the board of commissioners on April 16, 1985. On
22 April 18, 1985 petitioner appealed the same decision to us
23 (LUBA No. 85-030). The county board of commissioners
24 considered petitioner's appeal on April 24, 1985, concluded the
25 appeal was not timely filed and therefore refused to consider
26 it. On May 9, 1985, petitioner filed a Notice of Intent to

1 Appeal the governing body's decision with us (LUBA No.
2 85-034).²

3 The church is to be placed on two parcels totalling .85
4 acres. Because the parcels are in an Exclusive Farm Use Zone,
5 the grant of a conditional use permit requires a finding that
6 the property is not suitable for farm use. Marion County
7 Zoning Ordinance (MCZO) 136.040. The hearings officer found
8 the parcels were not in agricultural use. The parcels were
9 found to be in a rural subdivision where some undeveloped lots
10 are farmed. Record 13.

11 JURISDICTION

12 Marion County urges us to dismiss both cases on the ground
13 we lack jurisdiction. Respondent advises MCZO 122.120(a)
14 provides that an appeal of a hearings officer decision must be
15 filed within 10 days of the date the decision is mailed.³
16 Respondent says there is no provision in the county ordinance
17 permitting the county board of commissioners to consider an
18 appeal filed beyond this 10 day period. Because the petitioner
19 failed to file on time, there was nothing for the county board
20 of commissioners to review.⁴

21 Under ORS 215.422(1)(a), a party in a contested case
22 proceeding may appeal a decision by the hearings officer to the
23 county board of commissioners; the choice of procedure for that
24 appeal is up to the county. ORS 215.422(2) provides that a
25 party aggrieved by the final decision of the board may be
26 appealed to LUBA. The county claims that where it is clear, as

1 here, that a route to appeal the hearings officer's decision is
2 available, and has not been properly pursued, LUBA has no
3 jurisdiction.⁵

4 Petitioner argues an appeal to the county board would have
5 been futile;⁶ therefore, failure to file a timely appeal to
6 the county board should not bar LUBA's review of the decision.
7 Petitioner advises the county board is entitled to call up the
8 decision of the hearings officer under MCZO 122.070. If the
9 board decides to call up a decision, the board must do so at
10 the meeting where notice of a decision of the hearings officer
11 is presented. MCZO 122.070. It did not do so in this case.
12 As we understand petitioner's argument, because the board did
13 not call up the decision, the futility of such an appeal is
14 clear.

15 We believe petitioner was obliged to file a timely appeal
16 of the hearings officer's decision. A person wishing to appeal
17 the decision to the governing body must file an appeal with the
18 county clerk within 10 days of the date of mailing the notice.
19 The notice was mailed, and no appeal was filed within the 10
20 days provided in MCZO 122.080.⁷ The fact the board may,
21 under MCZO 122.070, call the matter up and review it on its own
22 motion makes no difference to the outcome of this case. The
23 board is not obliged to call up the decision, and there is
24 nothing requiring the board to even consider whether it should
25 call up the decision. Therefore, the board's failure to call
26 up the decision does not indicate the board's propensities if

1 an appeal were filed.

2 We believe this procedure is sanctioned under ORS 215.402
3 to ORS 215.438. The board has empowered a hearings officer to
4 hear contested cases. MCZO 122.050. The hearings officer may
5 decide to grant or deny the application. MCZO 122.060.
6 Decisions rendered at this stage are effective 10 days after
7 notice of the decision is mailed unless reviewed by the county
8 governing body. MCZO 122.080.

9 Review by the governing body can occur in two ways. Under
10 MCZO 122.070, the governing body may "call up" the hearings
11 officer's decision.

12 Alternatively, the decision may be reviewed upon the filing
13 of an appeal. Under MCZO 122.120, an appeal may be taken to
14 the governing body as long as it is filed within 10 days of the
15 date the hearings officer's decision is mailed. It is clear
16 the reason for the 10-day waiting period within the county
17 appeal structure is to allow a person adversely affected by the
18 decision to appeal it to the county board. Where no appeal is
19 filed, the decision of the hearings officer is effective and
20 permits may be issued. MCZO 122.080.⁸ Under this system, if
21 the petitioner lets the decision rest with the hearings officer
22 by failing to file an appeal to the county board, the
23 petitioner has not exhausted his remedies "available by right"
24 as required by ORS 197.825(2)(a). Where the petitioner does
25 not exercise his right of appeal, we must dismiss the case.
26 ORS 197.825(2)(a); Lyke v. Lane County, 70 Or App 82, 688 P2d

1 411 (1984).

2 We therefore dismiss LUBA Case No. 85-030.

3 The county's argument urging LUBA No. 85-034 should be
4 dismissed is somewhat confusing. Marion County first claims
5 that because there has been no decision by the Marion County
6 Board, petitioner's appeal does not fall within the purview of
7 ORS 215.422(2) providing that a party aggrieved by a final
8 determination may have it reviewed by this Board. Because
9 there has been no final decision, the case must be dismissed.
10 In a later memorandum, however, the county argues that the
11 record shows the county acted by refusing to consider an appeal
12 which was not timely filed.

13 There is a letter from the board of commissioners'
14 secretary to the county planner which states, in part, that
15 "[I]t was the action of the board, on the advice of
16 Legal Counsel, not to accept that appeal." Record 1.

17 The letter refers to the conditional use decision made by the
18 hearings officer and on appeal to this Board. Respondent does
19 not argue that this letter is ineffective as a memorial of the
20 county board's decision. Therefore, we will consider this
21 letter to represent a decision of the county governing body.
22 See OAR 661-10-010(3); Astoria Thunderbird, Inc. v. City of
23 Astoria, ___ Or LUBA ___ (LUBA No. 84-084), Order Denying
24 Motion to Dismiss, January 25, 1985; Urban Resources, Inc. v.
25 City of Portland, 5 Or LUBA 299 (1982). We further believe
26 that such a decision is appealable to this Board as a "land use

1 decision" under ORS 197.015(10), and ORS 197.825. It is a
2 final determination on an action which implements the county
3 zoning code.

4 As discussed earlier, petitioner's appeal of the hearings
5 officer's decision was not timely filed. Because the decision
6 was not timely filed, the county was under no obligation to
7 review the hearings officer's decision. Its decision, that is,
8 its refusal to review the conditional use permit, is in keeping
9 with the provisions of its own ordinance and, we believe, ORS
10 215.422(1)(a) which recognizes that a county governing body may
11 prescribe the manner in which appeals may be taken to the
12 county governing body.⁹

13 We therefore affirm the county's decision in LUBA Case No.
14 85-034.

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FOOTNOTES

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The two cases are consolidated for our review.

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The Notice of Intent to Appeal identifies the decision on appeal as the grant of the conditional use permit. The date of the decision is recited in the notice as the date of the letter from the county board's secretary advising the board refused to consider the appeal of the conditional use. We treat the matter in No. 85-034 to be an appeal of the county board's refusal to entertain petitioner's appeal of the conditional use permit.

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Section 122.120(a) of the Marion County Zoning Ordinance states:

"122.120 APPEAL TO THE GOVERNING BODY.

"(a) An appeal may be taken to the Governing Body by any person, firm, or corporation, or by an officer, department, board or commission of any public corporation or political subdivision of the State of Oregon aggrieved or affected by the determination of the Planning Commission or Hearings Officer on an application for a variance. An appeal must be filed with the County Clerk within 10 days from the date of mailing of notice of the decision of the Planning Commission or Hearings Officer. The appeal shall be filed in duplicate and one copy thereof shall be forwarded immediately by the Clerk to the Building Officer of Marion County. The appeal shall state wherein the Planning Commission or Hearings Officer failed to conform to the provisions of the ordinance. Upon the filing of an appeal the Clerk shall request the Director to certify and transmit to the Governing Body, the original application for variance and copies of all other papers constituting the record upon which the action appealed from was taken."

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2 Petitioner filed his appeal on the eleventh day after
3 mailing.

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6 While not discussed in respondent's brief, ORS
7 197.825(2) (a) limits our jurisdiction

8 "to those cases in which the petitioner has exhausted
9 all remedies available by right before petitioning the
10 board for review...."

11
12 The Marion County Zoning Ordinance includes a right to appeal a
13 hearings officer's decision to the county board within 10 days
14 of its being mailed. MCZO 122.120(a). We believe this
15 procedure establishes a remedy "by right" as recognized in ORS
16 197.825(2) (a).

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19 6 Petitioner also claims the appeal was pursued "albeit not
20 effectively because of the time problem and the ruling of the
21 board of commissioners." Reply Brief of Petitioners at 3. The
22 fact the appeal was not pursued on time is critical and the
23 reason for our dismissal of the appeal.

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26 7 MCZO 122.120(b) provides that if an appeal is filed, the
27 decision is stayed until the board of commissioners act on the
28 appeal. The board has three alternatives. It may remand the
29 case to the hearings officer, it may similarly deny the appeal,
30 or it may schedule a hearing to consider the appeal. MCZO
31 122.120(c). It is not obliged to take any of these actions if
32 no appeal is filed.

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35 8 Because the ordinance makes the hearings officer's decision
36 "effective" if no appeal is taken up by the governing body, the
37 ordinance delegates final decision-making authority to the
38 hearings officer. ORS 215.422(1)(b) authorizes such a
39 delegation. See also, Fish and Wildlife Dept. v. LCDC, 288 Or
40 203, 603 P2d 1391 (1979).

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43 9 Petitioner has filed a Motion for Special Evidentiary

1 Hearing asking that if we find that we do not have jurisdiction
2 in these cases, that petitioner be allowed to take testimony
3 from the Marion County Commissioners "concerning their intent
4 to fully review this case." We deny the motion. As discussed
5 above, our holding rests upon our understanding of the Marion
6 County appeals mechanism. Even if we found the board of
7 commissioners to have been adamantly opposed to review of the
8 decision, the outcome would be the same. The county followed
9 its ordinance and reached a permissible decision under the
10 ordinance.

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