BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES PIENOVI,

Petitioner,

vs.

CITY OF CANBY,

Respondent,

and

JOHN TORGESON,

Participant-Respondent.

LUBA Nos. 87-112/87-113

FINAL OPINION
AND ORDER OF DISMISSAL

Appeal from City of Canby.

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

DISMISSED 04/14/88

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

Bagg, Chief Referee.

Respondent City of Canby moves to dismiss this review proceeding.[1] The city argues the petitioner appeals a nonexistent land use decision.[2] The city states

> "The notices of intent to appeal filed by petitioner include as an exhibit a letter from the City Attorney to petitioner's attorney stating categorically that the City Council took no action on this matter. An affidavit of the City Administrator appended as an exhibit to this motion reaffirms that no action was taken by the City Council and that the petitioner was so advised." Motion to Dimiss Appeal, p. 1.

The city argues the decision of the former city administrator to recognize the nonconforming use status of the gravel extraction operation was not passed upon by the city council. As we understand the argument, respondent city claims there is no decision for us to review. In addition, according to the city, the administrative decision recognizing nonconforming use status was made in 1986, and the time to appeal such a decision, if it is appealable at all, has long since passed.

ORS 197.825(2)(a) states our jurisdiction "is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review." The Canby Land Development Ordinance (CLDO) provides for an appeal of a land use decision by the city administrator to the planning commission. Code Section 10.8 40(e). Under ORS 197.825(2)(a), petitioner is required to exhaust local appeals before appealing to this board. Cope v. City of Cannon

Beach, ___ Or LUBA ___ (LUBA No. 87-023, August 7, 1987); Lyke v. Lane County, 70 Or App 82, 84, 688 P2d 411 (1984). Thus, petitioner's attempt to appeal the city administrator's April 4, 1986 decision directly to us in LUBA No. 87-112 must be dismissed.

We understand petitioner to argue that he did follow this appeal process and that the end result was the November 10, 1986 letter from the city attorney, appealed in LUBA No. 87-113, which states that the city council declined to hear his appeal.

Petitioner argues the city administrator's determination is in the nature of a "permit" under ORS 227.160(2). Under the statute, a "permit" is the "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." According to petitioner, a determination of whether or not Mr. Torgeson enjoys nonconforming use status for his gravel operation requires the exercise of discretion. Because discretion must be exercised, petitioner argues the determination of nonconforming use status is a permit and the city is required to comply with the procedural and substantive requirements of ORS 227.160 et seq, including ORS 227.173.

According to petitioner, ORS 227.173 requires that approval or denial of a discretionary permit must be based on certain standards and criteria and must include a statement explaining the criteria, standards, and facts relied upon in reaching the

decision. Petitioner also argues that ORS 227.173(3) requires that written notice of such approval or denial be given to all parties to the proceeding.

We conclude that a determination of whether a nonconforming use exists requires the exercise of discretion and therefore falls within the definition of the term "permit" as it appears in ORS 227.160(2). The analysis required to make such a determination is not subject to any clear and objective standards included in local ordinance or state statute. See Doughton v. Douglas County, 88 Or App 198, ___ P2d ___ (1987). Determination of nonconforming use status requires consideration not only of the character of the use, but its history, extent and relationship to uses allowed and disallowed by local regulatory ordinances. See Polk County v. Martin, 292 Or 69, 639 P2d 952 (1981).

Because we consider a determination of nonconforming use status to be a permit under ORS 227.160(2), we believe Doughton v. Douglas County, ___ Or LUBA ___ (LUBA No. 86-015, August 17, 1987) applies. In Doughton, we held that county land use proceedings regarding "permits," as defined in ORS 215.402(4), require notice and hearing procedures as provided in ORS 215.416.

The definition of "permit" is essentially the same in ORS 227.160(2) (for cities) and 215.402(4) (for counties). ORS 215.416 provides substantially the same process for county permit proceedings as ORS 227.173 and 227.175 provide for

cities. Both ORS 215.416(11) and 227.175(10) provide that a designee of the local governing body may approve or deny a permit application without a hearing if proper notice of the decision is given and an opportunity for appeal is provided.[3]

As previously noted, the city's ordinance does provide an opportunity for appeal of a city administrator's decision. In this case, we believe the city administrator's April 4, 1986 decision did not become final for the purpose of appeal until the city gave the notice required by ORS 227.175(10) to petitioner. See League of Women Voters v. Coos County, 82 Or App 673, 681, 729 P2d 588 (1986); Bryant v. Clackamas County, 56 Or App 442, 643 P2d 649 (1982).[4]

We must next determine what notice the city was required to give petitioner of the city administrator's April 4, 1986 decision. ORS 227.175(10) requires that notice of the decision be given in the same manner that notice of a hearing would be given if a hearing were held.

Petitioner claims entitlement to written notice on the theory that CLDO 10.8.30(D) requires notice of any hearing be sent by mail to property owners within 200 feet of the subject property and be posted and published. As we understand petitioner's argument, had such notice been given, petitioner would have been aware of the pendancy of the nonconforming use determination and would have been able to appear at a hearing and participate. This participation would then have entitled petitioner to status as a party and the written notice required

by ORS 227.173(3).[5]

Petitioner does not assert that his property is within the 200 feet referred to in the city's ordinance. Accordingly, we conclude petitioner was not entitled to written notice of a hearing, had one been held, and therefore was not entitled to written notice of the city decision made without a hearing. Petitioner was, however, entitled to have the city post and publish notice of its decision. We note the city has neither posted nor published notice of its decision. In these circumstances the city administrator's decision became final for the purpose of petitioner's initiating the local appeal process when petitioner received actual notice of the decision.

Petitioner claims to have learned of the city administrator's nonconforming use decision at a planning commission meeting on June 22, 1987 and therefore had actual notice of the decision on that date. On July 13, 1987, petitioner appeared before the planning commission to ask for review of the city administrator's April 4, 1986 decision. Petitioner was advised that the matter was "in the hands of the city council and any request should be made of them [sic]." Minutes of July 13, 1987 Planning Commission Meeting, p. 1. Petitioner then made an oral request on July 15, 1987, before the city council, for review of the city administrator's decision.

Clearly, petitioner did not "appeal" the city administrator's decision until well past the 10 day limit

provided for in the city's ordinance. Petitioner's initial appearance before the planning commission on June 22 did not include a request to review the administrator's decision. At that time petitioner's representative only expressed misgivings about the city administrator's interpretation. There is nothing in the record to show petitioner filed any written appeal or otherwise requested planning commission action on the city administrator's decision until July 13, 1987.

Under these circumstances, we believe petitioner failed to properly perfect an appeal of the city administrator's decision, and therefore petitioner is precluded from bringing his appeal of the city council's refusal to consider his appeal, LUBA No. 87-113, to this Board. See ORS 197.825(2)(a).

We conclude both cases must be dismissed.

FOOTNOTES

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1 In addition to the Motion to Dismiss, the Board has before it a motion to consolidate the review proceedings, and an objection to the record.

MOTION TO CONSOLIDATE

Respondent City of Canby filed a Motion to Consolidate these two appeals for the purposes of our review. The first appeal is of a letter by the Canby City Administrator dated April 4, 1986, declaring that John Torgeson has a nonconforming use to operate a gravel extraction operation.

The second appeal is of a decision by the Canby City Council to take no action regarding petitioner's request that the administrative decision regarding Mr. Torgeson's nonconforming use be reviewed by the city council.

There is no objection to the consolidation by any party to this proceeding, and the appeals will be consolidated for the purposes of our review.

OBJECTION TO THE RECORD

Petitioner filed an objection to the record requesting that certain information be submitted to this Board and included in the record of the local government decision. The materials requested by petitioner have been submitted. Along with them are the minutes of an executive session, specifically requested by petitioner. The record is settled.

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2 The city also argues that notices of intent to appeal do not contain the information required by OAR 661-10-015. That is, the notices lack the full title of the land use decision, the date of the decision and a concise description of the land use decision.

Lastly, the notices, according to the city, do not identify an indispensable party. According to respondent, John Torgeson is the owner of the property and the gravel extraction business located on that property. Respondent city argues

> "if this was a land use decision by respondent as alleged by petitioner, Mr. Torgeson, as the owner of the property and the owner of the business would be by

necessity a party to the proceeding [sic] and the respondent would be required to give him notice of any decision concerning his property." Motion to Dismiss Appeal, p. 2.

Technical violations of LUBA rules will not affect the outcome of a proceeding unless respondent is able to show prejudice. OAR 661-10-005. In this case, respondent shows no prejudice as a result of any omission in the form of the notices of intent to appeal.

With respect to respondent city's indispensable party argument, we note petitioner has served Mr. Torgeson with a copy of the notices of intent to appeal. Failure to serve the notice precisely as required by Board rules is not fatal. Atwood v. City of Portland, 1 Or LUBA 355, 356 (1980). Because petitioner served Mr. Torgeson with a copy of the notices of intent to appeal in ample time for Mr. Torgeson to intervene and participate in these proceedings, the city's motion to dismiss on this issue is denied.

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[3] ORS 215.416(11) and 227.175(10) contain the following identical language:

> "The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same manner as notice of the hearing would have been given if a hearing had been held. An appeal from a hearings officer's decision shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be a de novo hearing."

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[4] In these cases the Court of Appeals held that a county decision does not become final for the purpose of calculating the time for filing an appeal to the local governing body or to this board until written notice of the decision has been given

to a party to the proceeding, as required by ORS 215.416(10) (then codified as ORS 215.416(7) or (8)). Both cases concerned discretionary permit proceedings at the local level which had included hearings, making ORS 215.416(10) the applicable statutory provision regarding required notice of the local decision. In contrast, this case concerns a discretionary permit proceeding in which no hearing was held at the local level, making ORS 227.175(10) (the analog of ORS 215.416(11)) the applicable statutory provision concerning required notice of the local decision. Nevertheless, we believe the court's reasoning and the policy behind its decisions in these other cases apply equally to interpretation of ORS 227.175(10):

> "The corollary of LUBA's cogent point is that the variety and informity of local recordkeeping procedures give the decisionmaking bodies and their agents the familiarity that the parties who appear before them do not have with [sic] where the information resides in their courthouses and city halls. Although we suggest no evil motivation in this or in the generality of cases, the relationship between parties who seek to appeal a county's land use decision and officials of the county is hardly the same as the relationship between the clerk and the parties to a civil action. In the land use context, the county is the deciding body as well as the recordkeeper. Counties are always nominally, and are often in fact, adverse parties to the appellant in appeals to LUBA from their decisions. The peculiar ability of county officials to know whether and when a decision has been made and where it can be found, together with their interest in the decision, makes their statutory duty to give notice of the decision almost fiduciary in nature. We do not think that the legislature intended to permit the nonperformance or delayed performance of that duty to defeat the possibility of a timely appeal from a county's land use decision." League of Women Voters v. Coos County, 82 Or App 673, 679-80 (1986).

We conclude with regard to the notice of decision requirement of ORS 227.175(10), as the court did with regard to the notice of decision requirement of ORS 215.416(10), that the legislature did not intend for nonperformance or delayed performance of the duty to give notice of a discretionary permit decision made without hearing to defeat the possibility of a timely appeal of that decision.

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[5] As previously explained, we conclude the notice to which

petitioner is entitled is governed by ORS 227.175(10), not ORS 227.173(3).