BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARVIN L. DACK, Petitioner, vs. CITY OF CANBY, Respondent, and JOHN TORGESON, Intervenor-Respondent.	LUBA No. 88-073 FINAL OPINION AND ORDER

Appeal from City of Canby.

Steven L. Pfeiffer and John Shurts, Portland, filed a petition for review and reply brief and John Shurts argued on behalf of petitioner. With them on the briefs was Stoel, Rives, Boley, Jones and Grey.

John H. Kelley, Hubbard, filed a response brief on behalf of respondent City of Canby.

John Torgeson, Molalla, filed a response brief and argued on his own behalf.

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

REMANDED 12/16/88

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision by the Canby City Council to deny his appeal of a planning commission decision. The planning commission rejected his appeal of a city administrator's administrative ruling that an aggregate extraction operation is a nonconforming use.

MOTION TO INTERVENE

John Torgeson moves to intervene on the side of respondent in this proceeding. There is no opposition, and we allow the motion.

FACTS

Intervenor-respondent's (intervenor's) aggregate extraction operation is located on a 23 acre site within the flood plain and alluvial area of the Molalla River. The site is zoned Low Density Residential (R-1). Record 73P.[1] On April 4, 1986, the city administrator issued a letter ruling that intervenor has a right to conduct his aggregate extraction operation as a nonconforming use. Record 81P. No notice of the city administrator's decision was given to the general public or to neighboring property owners.

In May, 1987, intervenor applied to the city for permission to expand his nonconforming use with the addition of a rock crushing operation. As the owner of adjacent property, petitioner received a notice of the planning commission's hearing which described the proposal as "[e]xpansion of a Non

Conforming Use to allow for a rock crushing operation in conjunction with an existing aggregate removal operation." Record 91P. At the planning commission's June 22, 1987 hearing on the proposed expansion, petitioner and others learned for the first time that the city administrator had issued the April 4, 1986 letter ruling that intervenor's aggregate extraction operation is a nonconforming use.

On July 11, 1988, petitioner filed an appeal of the city administrator's April 4, 1986 decision with the planning commission. Record 18. On July 12, 1988, the planning commission rejected petitioner's appeal. The planning commission decision states that the deadline for appealing staff determinations to the planning commission is ten days, and that petitioner's appeal was not timely filed, given that petitioner had actual knowledge of the city administrator's decision on or before June 22, 1987 and did not file his appeal until July 11, 1988. Record 11.

On July 26, 1988, petitioner appealed the planning commission's decision to the city council. On August 4 1988, the city council issued the challenged decision denying petitioner's appeal.

INTRODUCTION

An earlier appeal to LUBA, Pienovi v. City of Canby (Pienovi), supra, was the result of another petitioner's attempt to appeal the same April 4, 1986 city administrator's nonconforming use determination. In our final opinion in that

case we made several determinations with regard to the facts and relevant legal standards which are applicable to this case as well.

First, we concluded that the city administrator's April 4, 1986 nonconforming use determination required the exercise of discretion and, therefore, fell within the definition of the term "permit" as it appears in ORS 227.160(2).[2] We stated that under ORS 227.175(10), a designee of the governing body may approve or deny a "permit" without a hearing if proper notice of the decision is given and an opportunity for appeal is provided.[3] Pienovi, slip op at 4-5.

Second, we determined that the Canby Municipal Code (code), section 16.88.140.E,[4] provides for appeals of staff determinations to the planning commission and such appeals must be exhausted before appealing to LUBA. Pienovi, slip op at 2. Third, we held that the city administrator's April 4, 1986 decision did not become final for the purpose of appeal until the city gave petitioner Pienovi the notice required by ORS 227.175(10). Pienovi, slip op at 5.

Finally, we found that under ORS 227.175(10) and code 16.88.130.D,[5] the city was required to give written notice of the administrator's April 4, 1986 decision to owners of property within 200 feet of the subject site. Pienovi, slip op at 5-6.

The city previously filed a motion to dismiss this appeal on the ground that petitioner Dack had actual notice of the

city administrator's decision on or before June 22, 1987 and did not file his appeal to the planning commission in a timely manner. In our October 13, 1988 order, we denied that motion, based on our interpretation of the reasoning underlying the Court of Appeals decision in League of Women Voters v. Coos County, 42 Or App 673, 729 P2d 588 (1986).

We held that, when ORS 227.175(10) and code 16.88.130.D require that written notice be provided to petitioner, written notice must be provided before the time within which petitioner must appeal begins to run. We stated that actual notice does not substitute for written notice in these circumstances. We also specifically found that petitioner Dack is entitled, under the above-cited statute and code provisions, to written notice of the city administrator's April 4, 1986 decision, and the city has not given him such notice.[6]

INTERVENOR'S MOTION TO DISMISS

Intervenor moves to dismiss petitioner's appeal on the grounds that (1) the appeal is against the wrong respondent; and (2) petitioner filed an earlier appeal to the city council on July 14, 1987.

A. Wrong Respondent

Intervenor argues that petitioner has filed his appeal against the wrong respondent because the mining "permit" for intervenor's operation was actually issued by the Oregon Department of Geology and Mineral Industries (DOGAMI). Intervenor contends the city administrator's April 4, 1986

letter was not a "permit," but rather a determination that intervenor "would not need to apply for a conditional use hearing prior to submitting [his] application for a mining permit to" DOGAMI. Motion to Dismiss 3. Intervenor argues that the city is not authorized to issue mining permits and did not do so. According to intervenor, the State of Oregon issued his mining permit and should be the respondent in this case.

As best we can determine, intervenor's point is that if petitioner wished to challenge intervenor's right to conduct aggregate extraction operations on the subject site, petitioner should have appealed DOGAMI's approval of intervenor's mining permit, rather than the city administrator's determination that the operation constitutes a nonconforming use. However, intervenor's point is irrelevant to the matter at hand, as what petitioner did appeal in this proceeding is clearly the city's refusal to consider his appeal of the city administrator's April 4, 1986 nonconforming use determination.

Intervenor may also argue that the city lacked authority to regulate his aggregate extraction operation and, therefore, the city administrator's April 4, 1986 ruling is not subject to LUBA review. However, in Forman v. Clatsop County, 297 Or 129, 132, 681 P2d 786 (1984), the Oregon Supreme Court held that a county determination of a right to continue a nonconforming use constituted a decision concerning the application of a land use regulation (the county zoning ordinance) and, therefore, was a "land use decision" within the exclusive jurisdiction of LUBA.

ORS 197.015(10)(a)(iii). Similarly, in this case, the city administrator's decision is a determination concerning application of the city zoning ordinance, and is a "land use decision" which LUBA has exclusive jurisdiction to review.

B. Earlier Appeal

Intervenor claims that petitioner filed an earlier appeal of the city administrator's decision to the city council on July 18, 1987. Intervenor argues that any appeal to LUBA should have been based on this original appeal, rather than on the subsequent appeals to the planning commission and city council filed by petitioner in 1988. Intervenor argues that his rights were prejudiced because he was never told by either petitioner or the city that the earlier appeal had been filed.[7]

The record contains a letter from petitioner to the city council, dated July 14, 1987, which states he asks the council "to review and thereby deny the application made by John Torgeson in regard to his mining of gravel on his 23+ acres in the city limits of Canby." Record 23P. The letter expresses petitioner's concern with "not only the procedure used to grant the conditional use, but also the factually inaccurate information presented to the City of Canby." Id. Intervenor does not claim, and the record contains no indication that, the city ever responded to petitioner's July 14, 1987 letter.

In our October 13, 1988 order on the city's motion to dismiss, we held that petitioner's ten day period under code

16.88.140.E for appealing the city administrator's decision to the planning commission would not begin to run until petitioner received written notice of the city administrator's decision; and, therefore, his July 11, 1988 appeal to the planning commission was timely filed. We must now consider whether petitioner's submission of the July 14, 1987 letter to the city council affected the time period for his filing an appeal of the city administrator's decision to the planning commission. We conclude it did not.

First, it is not clear that the letter refers to the April 4, 1986 decision by the city administrator determining that a nonconforming use exists. The letter does not identify the date of the decision sought to be reviewed and refers to the granting of a "conditional use." More importantly, the city council did not treat the letter as an appeal of the city administrator's decision in that it did not conduct an appeal proceeding or direct the planning commission to do so. In fact, it did not respond to the letter at all, in writing or otherwise.

What petitioner is entitled to under ORS 227.175(10) and code 16.88.140.E is to have the planning commission hear his appeal of the city administrator's decision if he properly files such appeal within ten days of being mailed or personally provided with written notice of the decision by the city. That did not happen in response to petitioner's July 14, 1987 letter to the city council.[8]

Thus, at most, the letter constitutes additional evidence that petitioner had actual notice of the city administrator's decision on or before July 14, 1987. However, as we have already held, actual notice does not substitute for the written notice petitioner is entitled to under the statute and code. Therefore, we consider petitioner's July 11, 1988 appeal to the planning commission to have been timely filed, notwithstanding his earlier submission of the July 14, 1987 letter to the city council.

Intervenor's motion to dismiss is denied.

CITY'S MOTION TO DISMISS

One issue raised by the city in its motion to dismiss, and its response brief, was not dealt with in our October 13, 1988 order. The city argued that since petitioner had actual notice of the city administrator's decision over a year before his July 11, 1988 appeal to the planning commission was filed, this appeal should be dismissed under the common law doctrine of laches. The city contends that laches is well recognized as a defense in land use cases, citing Collins v. Rathbun, 43 Or App 857, 866 (1979) and Emerson v. Decschutes Cty Board of Commissioners, 46 Or App 247, 250 (1980).

Intervenor also argues that the elements of a laches defense are present in this case. First, intervenor maintains that petitioner had actual knowledge of the city administrator's decision and delayed asserting his appeal rights without sufficient reason. Intervenor points out that

even after our April 11, 1988 decision in Pienovi, supra, clarified petitioner's appeal rights, petitioner delayed an additional three months before filing his appeal to the planning commission. Second, intervenor claims that petitioner's delay in exerting his appeal rights has caused substantial financial injury to intervenor due to lost business, bad publicity and the city's refusal to proceed with a decision on intervenor's proposed expansion of his nonconforming use.

Petitioner argues that the doctrine of laches is an equitable defense in a court suit only. Petitioner explains the cases cited by respondent involve attempts to seek reversal of land use decisions in lawsuits in circuit court, outside of the proper LUBA review process. Petitioner argues that the laches doctrine has never been applied "to void the non-discretionary, internal administrative review process mandated by statute before it ever officially, legally begins." Reply Brief 2.

Petitioner also argues that, even if the doctrine of laches is theoretically applicable, the necessary elements of a laches defense are not present in this case. Petitioner contends the record in this case contains no evidence of substantial prejudice to intervenor due to any delay by petitioner. Petitioner further argues that there was no unreasonable delay before the filing of petitioner's July 11, 1988 appeal to the planning commission. Petitioner believes that the three month

delay in filing his appeal after the Pienovi appeal was dismissed was not unreasonable, as it "took a short amount of time for all persons concerned to understand the [Pienovi] opinion's implications." Reply Brief 2.

For laches to apply, there must be (1) unreasonable delay by a party with knowledge of all relevant facts under which it could have acted earlier, (2) resulting in substantial prejudice to an opposing party to the extent that it would be inequitable to afford the relief sought against the party asserting laches as a defense. Ellis v. Roberts, 302 Or 6, 10, 725 P2d 886 (1986); Stephan v. Equitable S & L Assn., 268 Or 544, 569, 522 P2d 478 (1974).

We note that, with certain exceptions that are not relevant to this appeal, LUBA's review is confined to the record of the local government proceeding.[9] ORS 197.830(11)(a). It is clear from the record that petitioner gained actual notice of the city administrator's April 4, 1986 decision no later than June 22, 1987. Record 34-35P. Nevertheless, petitioner did not attempt to appeal that decision to the planning commission until July 11, 1988, over a year later. On the other hand, petitioner may have attempted to obtain review of the decision by his July 14, 1987 letter to the city council, which was apparently ignored by the city. Furthermore, it was not clear that petitioner's ten day period for appeal to the planning commission might not begin to run until he was given written notice of the city administrator's decision until we issued our

April 11, 1988 decision in Pienovi. There is nothing in the record to indicate when petitioner first learned of that decision. Thus, we are unable to conclude, based on the facts in this record, that petitioner's delay in filing his appeal to the city council was unreasonable.

Furthermore, in this case, the record does not demonstrate that petitioner's delay in filing his appeal of the city administrator's decision to the planning commission resulted in substantial prejudice to intervenor. In fact, we are not cited to any evidence in the record establishing the effects of petitioner's delay on intervenor.

Thus, we do not have before us either of the necessary elements for a laches defense. We, therefore, deny the city's motion to dismiss petitioner's appeal based on laches.[10]

FIRST AND SECOND ASSIGNMENTS OF ERROR

> "Respondent City of Canby failed to follow applicable procedures by failing to provide petitioner mailed written notice of the city administrator's decision and by denying petitioner a hearing before the planning commission to which he is entitled."
>
> "Because respondent failed to hold the required hearing, respondent failed to issue a proper decision supported by findings based on substantial evidence on the issue that should have been the subject of the hearing."

Petitioner argues that if the Board determines that petitioner's appeal to the planning commission of the city administrator's April 4, 1986 decision was timely filed, "there is nothing left for the Board to do except remand this matter to the City so that the Planning Commission can hold the

hearing to which petitioner is entitled." Petition for Review 4. According to petitioner, the city's sole basis for denying him a hearing on his appeal was its erroneous conclusion that the ten day appeal period provided by code 16.88.140.E had run after he had received actual notice of the city administrator's decision. Because the city failed to hold a hearing, it also failed to issue a proper decision on the merits of his appeal.

The arguments in respondent's and intervenor's briefs are based entirely upon their contentions that petitioner's appeal to the planning commission was not timely filed. Neither respondent nor intervenor contends that the city's decision to refuse to hear petitioner's appeal is legally correct if petitioner's appeal was timely filed and laches does not apply.

We conclude that the city improperly construed the applicable law in rejecting petitioner's July 11, 1988 appeal to the planning commission on the ground it was not timely filed. The city, therefore erred in denying petitioner a hearing and decision on the merits of his appeal.

The first and second assignments of error are sustained.

The city's decision is remanded.

FOOTNOTES

1

The parties agree that the record in Pienovi v. City of Canby, ___ Or LUBA ___ (LUBA Nos. 87-112 and 87-113, April 14, 1988) is to be considered part of the record in this case. References to the record of the earlier case will be identified by a "P" after the page number.

2

ORS 227.160(2) states:

"'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation."

3

ORS 227.175(10) provides:

"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."

4

Code 16.88.140.E provides:

"Appeal of Staff Determinations. Any decision or interpretation of this title [Title 16, Planning and Zoning] made by the staff may be appealed to the commission without fee, provided that such appeal is filed in writing within ten days of the staff decision."

Furthermore, we note that code 16.88.140.B provides for appeals of planning commission decisions to the city council as follows:

> "Appeal to the Council. An action or ruling of the commission authorized by this title may be appealed to the council within fifteen days after the commisssion has rendered its decision by filing written notice with the city planner * * * ."

---

[5] ORS 227.175(10) requires that notice of the decision be given in the same manner as notice of a hearing would have been given if a hearing had been held. Code 16.88.130.D provides in relevant part:

> "Public Notice. Prior to conducting a public hearing as prescribed in this section, public notice including the time, place, and general nature of the hearing shall be posted in the following manner:
>
> " * * * * *
>
> 3. For all quasi-judicial public hearings involving specific individual properties, the city planner shall be responsible for mailing copies of the public notice to all owners of property within two hundred feet of the subject property * * * ."

---

[6] The city conceded in its motion to dismiss that it has not sent written notice of the city administrator's decision to petitioner. Motion to Dismiss 2. However, intervenor argues that the May 22, 1987 notice of the planning commission's public hearing on intervenor's application for expansion of his nonconforming use, which was mailed to petitioner, constitutes such written notice. Record 90-91P.

ORS 227.173(3) requires that a city provide written notice of its decision to the parties to a discretionary permit proceeding, but does not specify the contents of such notice. In Cope v. City of Cannon Beach, 15 Or LUBA 558, 560 (1987), we held that a letter from the city attorney which was adequate to inform petitioners that the city had approved the subject lot size reduction in 1984 satisfied the requirements of ORS 227.173(3).

ORS 227.175(10) similarly does not specify the contents of the notice which must be given to persons who would have been

entitled to notice of a hearing, if a hearing had been held. The notice of public hearing cited by intervenor informed petitioner only that intervenor had applied for the expansion of a nonconforming use to allow rock crushing in conjunction with an existing aggregate extraction operation. It did not inform petitioner that the city had made a determination in 1986 as to the validity of the existing nonconforming use. It, therefore, does not satisfy the requirement of ORS 227.175(10) and code 16.88.130.D.3 for written notice to petitioner of the city administrator's April 4, 1986 decision.

---

[7] Intervenor also argues that his rights were prejudiced because the planning commission dismissed petitioner's 1988 appeal without providing intervenor an opportunity to introduce evidence and raise pertinent issues. Intervenor further argues that his rights were prejudiced by the city council's dismissal of petitioner's 1988 appeal because he "was denied an opportunity to enter vital information into the record which now seriously threatens to prejudice my case before LUBA." Motion to Dismiss 2.

In these arguments, intervenor alleges errors by the city in making the decision appealed in this case, not grounds for dismissal of petitioner's appeal. If intervenor wished to challenge the city's decision, he should have done so by filing his own notice of intent to appeal or a cross petition under OAR 661-10-075(3).

---

[8] The significance of petitioner's July 14, 1987 letter is complicated by the fact that it was addressed to the city council, rather than to the planning commission. There is no indication in the record that petitioner ever sought to appeal the city administrator's decision to the planning commission prior to his July 11, 1988 appeal.

However, regardless of to whom the letter was addressed, we believe that the letter would have the effect of making petitioner's July 11, 1988 appeal to the planning commission untimely only if the city had treated the letter as an appeal and had acted upon it. In that case, petitioner would have had the appeal to which he is entitled under the statute and code, or at least he would have obtained a final decision by the city which could have been appealed to us. Had the city responded in this manner, petitioner would not thereafter have been entitled to file another appeal of the same decision.

[9] For instance, pursuant to ORS 197.830(11)(c), LUBA may take evidence on disputed allegations of constitutionality, standing or procedural irregularities which, if proved, would warrant reversal or remand of the appealed decision.

[10] We note, however, that it is not clear in any case that either we or the city have the authority to reject an otherwise properly filed appeal on the basis of a laches defense. The "land use cases" cited by respondent, Collins v. Rathbun and Emerson v. Decschutes Cty Board of Commissioners, supra, are cases in which the courts employed the doctrine of laches in declaratory judgment and mandamus proceedings. LUBA is a creature of statute, lacking the general equitable powers of a court. We are required to reverse or remand land use decisions when certain errors in those decisions are demonstrated. See ORS 197.835.