BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN TORGESON and SANDE TORGESON, Petitioners, vs. CITY OF CANBY, Respondent, and MARVIN L. DACK and JOHN W. BECK, Intervenors-Respondent.	LUBA No. 89-087 FINAL OPINION AND ORDER

Appeal from City of Canby.

John Torgeson and Sande Torgeson, Molalla, filed the petition for review. Sande Torgeson argued on her own behalf.

John H. Kelley, Hubbard, filed a response brief and argued on behalf of respondent.

Steven L. Pfeiffer and John Shurts, Portland, filed a response brief on behalf of intervenors-respondent. With them on the brief was Stoel Rives Boley Jones and Grey.

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

DISMISSED 05/24/90

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

Petitioners appeal a June 22, 1989 decision of the Canby City Council (city council) that petitioners' aggregate extraction operation is not a lawful nonconforming use.

MOTION TO INTERVENE

Marvin L. Dack and John W. Beck move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

Petitioners conduct an aggregate extraction operation on an approximately 23 acre parcel within the Canby city limits. The parcel is zoned Low Density Residential/Hazard Overlay Zone (R-1/H). Aggregate extraction is not listed as a permitted or conditional use in the R-1 zone. Canby Municipal Code (CMC) 16.16.010 and 16.16.020. Aggregate extraction is listed as a conditional use in the H overlay zone.[1] CMC 16.40.030.B. The subject property was zoned R-1 by Ordinance No. 452 on July 15, 1963. The H overlay zone

[1]Petitioners have never obtained a conditional use permit for their aggregate extraction operation. On September 16, 1988, the planning commission approved a conditional use permit for the addition of a rock crusher to petitioners' existing aggregate extraction operation, but not for the extraction operation itself. The planning commission's approval of the conditional use permit for the rock crusher relied on the city administrator's April 4, 1986 determination that petitioners' aggregate extraction operation is a lawful nonconforming use. The city administrator's determination is discussed infra.

was applied at a later date.

On April 3, 1986, petitioner John Torgeson filed an

application with the city administrator requesting a determination on the nonconforming use status of petitioners' aggregate extraction operation. Record 73. On April 4, 1986, the city administrator issued a decision ruling that petitioners have a right to conduct their aggregate extraction operation as a nonconforming use. Record 71. No notice of the city administrator's decision was given to the general public or to neighboring property owners.

On July 11, 1988, intervenor-respondent (intervenor) Dack filed an appeal to the planning commission of the city administrator's April 4, 1986 decision. On July 12, 1988, the planning commission rejected intervenor Dack's appeal because it was not timely filed under CMC 16.88.140.E.[2] Intervenor Dack appealed the planning commission decision to the city council, which denied his appeal. Intervenor Dack then appealed to this Board the city council's decision rejecting his appeal.

In Dack v. City of Canby, ___ Or LUBA ___ (LUBA No. 88-073, Order on Motion to Dismiss, October 13, 1988), we determined that under ORS 227.175(10) and CMC 16.88.130.D, intervenor Dack was entitled to written notice of the city administrator's April 4, 1986 decision, and that the city

[2]CMC 16.88.140.E provides that city staff decisions interpreting the CMC may be appealed to the planning commission if the appeal is filed "in writing within ten days of the staff decision."

had not given him such notice.[3] We also determined that the city must provide intervenor Dack with the written notice of the city administrator's decision to which he was entitled before the time within which he must appeal to the planning commission began to run. Id. We subsequently found the city erred in denying intervenor Dack a hearing on the merits of his appeal to the planning commission, and remanded the city council's decision denying his appeal. Dack v. City of Canby, ___ Or LUBA ___ (LUBA No. 88-073, December 16, 1988).

Pursuant to our remand, the planning commission scheduled a hearing on intervenor Dack's appeal for April 10, 1989. Record 43. On April 5, 1989, the city received a letter from petitioners' attorney stating that petitioner John Torgeson "hereby withdraws, revokes and cancels his pending Application before the City," and requesting that the April 10 appeal hearing be cancelled.[4]

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[3]If a city decision on a "permit," as defined in ORS 227.160(2), is made without a hearing, ORS 227.175(10) requires notice of that decision to "be given in the same manner as notice of the hearing would have been given if a hearing had been held." In Pienovi v. City of Canby, 16 Or LUBA 604, 606-607 (1988), an earlier appeal from a city decision rejecting another individual's appeal of the same city administrator decision, we determined that the city administrator's decision on the nonconforming use status of petitioners' aggregate extraction operation required the exercise of discretion and, therefore, falls within the definition of "permit" in ORS 227.160(2). CMC 16.88.130.D provides that notice of a land use hearing must be given by mail to owners of property within 200 feet of the subject property.

[4]The "pending Application" to which the letter refers is petitioner John Torgeson's April 3, 1986 application for a determination of the

Record 54. The planning commission nevertheless conducted the appeal hearing on April 10 and, on April 11, 1989, issued a decision which reversed the city administrator's April 4, 1986 decision and determined that petitioners' aggregate extraction operation is not a lawful nonconforming use.

Petitioners appealed the planning commission's decision to the city council. On June 22, 1989, after an appeal hearing on the record established before the planning commission, the city council denied petitioners' appeal and affirmed the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Respondents exceeded their jurisdiction and violated applicable law in holding a hearing and making a decision on petitioners' vested rights or nonconforming use rights to remove aggregate from their property."

Under this assignment of error, petitioners argue that the city exceeded its jurisdiction by holding the April 10, 1989 hearing on intervenor Dack's appeal and making a decision on that appeal because (1) there was no pending application on which the city could hold a hearing and make a decision; (2) the city administrator's April 4, 1986 decision has not yet become final for the purpose of appeal by intervenor Dack; (3) intervenor Dack's January 15, 1989

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nonconforming use status of petitioners' existing aggregate extraction operation.

written notice of appeal is inadequate in form to constitute a proper appeal; and (4) the CMC does not contain any procedures for holding such a hearing or any standards or criteria upon which to base such a decision. We first address petitioners' argument concerning absence of a pending application.

Petitioners argue that their application for a determination on the nonconforming use status of their existing aggregate extraction operation was withdrawn on April 5, 1989. Petitioners contend that under CMC 16.88.140, decisions of the city administrator and planning commission become final only if no appeal is filed. According to petitioners, since a timely appeal of the city administrator's decision had been filed, the city had not made a final decision on their application on April 5, 1989, when the application was withdrawn. Petitioners maintain that under these circumstances, the city could not refuse to accept the withdrawal of their application and, therefore, had nothing before it on which to hold a hearing or make a decision.

The city argues that the decision made by the city administrator and reduced to writing in his April 4, 1986 letter is a final land use decision, as defined in ORS 197.015(10). According to the city, because a final land use decision on petitioners' application had been made by the city, the application was no longer subject to

withdrawal by petitioners.

Intervenors argue that once the city made a decision on how its land use regulations applied to petitioners' use of their property, and that decision was "final for purposes of the petitioners' actions and future appeal, the petitioners lost unilateral control over the local government decisionmaking process." Intervenors-Respondent's Brief 15-16. Intervenors recognize that in Randall v. Wilsonville, 8 Or LUBA 185 (1983), LUBA held that the city lacked jurisdiction to make a decision when an application for a comprehensive plan amendment was withdrawn before the city council adopted a written order denying the application, because the city had not adopted a written, appealable final decision by the time of the withdrawal request. However, intervenors contend that in this case, the city administrator had issued a written, appealable final decision, a decision which petitioners themselves considered final and acted upon. According to intervenors, this means that after issuance of the city administrator's decision, petitioners no longer had power to unilaterally end the city proceedings by withdrawing their application.

In this case, it is clear that petitioners' application for a nonconforming use determination was withdrawn on April 5, 1989, when the city received petitioners' letter withdrawing, revoking and cancelling their application. Nevertheless, the city council's decision was based on

petitioners' appeal of the planning commission's decision on intervenor Dack's appeal of the city administrator's decision on petitioners' application. None of the city decision makers purported to act on any basis other than petitioners' original application and the appeals therefrom.[5]

In both Randall v. Wilsonville, supra (application for comprehensive plan amendment withdrawn after planning commission had made recommendation and city council had adopted oral tentative decision), and Friends of Lincoln Cty. v. Newport, 5 Or LUBA 346 (1982) (subdivision application withdrawn after planning commission decision was appealed to city council), we determined that where a land use application was withdrawn before the local government made a final decision on that application, any decision rendered by the local government was a nullity. In the absence of a pending application, the local government's decision "is at best an advisory memorandum which does not have the force or effect of a final land use decision over which this Board has jurisdiction." Randall v. Wilsonville, 8 Or LUBA at 190.

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[5]Under CMC 16.88.080 and 16.88.120, city staff and officials have authority to enforce the city's land use regulations, if the city finds that the regulations have been violated. However, the city did not conduct its proceedings or base its decision in this matter on its authority to enforce the CMC, but rather on petitioners' application for a nonconforming use determination. We also note that the CMC contains no procedures or standards for either determining the nonconforming use status of an existing use or determining whether an existing use violates the CMC.

We disagree with the city's and intervenors' contention that in this case the city had made a final decision at the time of petitioners' withdrawal of their application. In Dack v. City of Canby, supra, we determined that intervenor Dack filed a timely appeal of the city administrator's April 4, 1986 decision. If a timely appeal of the city administrator's decision on petitioners' application was filed, that decision was not a final decision by the city on petitioners' application. Thus, the city had not made a final decision on petitioners' application at the time it was withdrawn, and any decision made by the city on that application after its withdrawal is not a final land use decision subject to our review.

The first assignment of error is sustained.[6]

This appeal is dismissed.

[6]Our agreement with petitioners that any decision made by the city on petitioners' application, or appeals therefrom, after the application was withdrawn is a nullity, requires that we dismiss this appeal. It would therefore serve no purpose to consider petitioners' other arguments under this and other assignments of error contending that the city exceeded its jurisdiction and violated petitioners' constitutional rights to equal protection, equal privileges and immunities and due process in making the appealed decision.