BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELLEN M. PAUTLER, and STEPHEN A. SCOTT,	)	
Petitioners,	)	
vs.	)	
	)	LUBA No. 92-097
CITY OF LAKE OSWEGO,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
and	)	
DAVID ROY NORRIS, and DAVID MARK NORRIS,	)	
Intervenors-Respondent.	)	

Appeal from City of Lake Oswego.

Robert D. Van Brocklin, Portland, represented petitioners.

Jeffrey G. Condit, Lake Oswego, represented respondent.

Timothy J. Sercombe, Portland, represented intervenors-respondent.

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

DISMISSED 06/10/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal a city planning department decision approving a partition.

MOTION TO INTERVENE

David Roy Norris and David Mark Norris move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is zoned residential and consists of approximately 30,000 square feet. On March 9, 1990, the planning department approved a partition of the subject property, dividing it into three parcels. No public hearing was held concerning the partition request. Under Lake Oswego Code (LOC) 49.630(2)(a), such decisions of the planning department become final if they are not appealed to the Development Review Board (DRB) within 15 days after the planning department decision. No appeal of the planning department decision to the DRB has been filed to date.

Petitioners appeal the planning department's 1990 partition decision to this Board.

MOTION TO DISMISS

The city contends this Board lacks jurisdiction over the challenged decision for a number of reasons. Specifically, the city argues that the challenged decision became final two years ago and, therefore, this appeal is

untimely. Alternatively, the city argues that even if petitioners' appeal is timely, petitioners failed to exhaust their local administrative remedies before appealing to this Board, as required by ORS 197.825(2)(a).[1]

We resolve the motion on the basis of the city's exhaustion arguments. We do not reach the other bases for the motion to dismiss. We assume for purposes of resolving this motion that (1) petitioners were entitled to written notice of the challenged decision, and (2) the city failed to provide such written notice.[2]

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[1]The city provides the following explanation of the nature of the partition decision, and the process for a local appeal of that decision under the LOC:

> "The decision in this case was made pursuant to LOC 49.140(1)(H) which categorizes a minor partition as a 'minor development.' A decision on a minor development application is made by staff, subject to notice and an opportunity to appeal to the [DRB], and from the DRB to City Council. LOC 49.205, 49.225 and 49.630. A notice of intent to appeal a staff decision must be filed within fifteen calendar days of the staff decision. LOC 49.630(1)." Motion to Dismiss 2.

[2]The challenged decision approves a "permit" without holding a public hearing. The statutory requirements governing city decisions approving or denying permits are set forth in ORS 227.160 through 227.185. ORS 227.175(3), (5) and (10) provide in relevant part:

> "(3) Except as provided in subsection (10) of this section, the hearings officer shall hold at least one public hearing on [an application for a permit or zone change]."
>
> "(5) Hearings under this section may be held only after notice to the applicant and other interested persons and shall otherwise be conducted in conformance with the provisions of ORS 197.763."
>
> "(10) The hearings officer, or such other person as the governing body designates, may approve or deny an

Citing League of Women Voters v. Coos County, 82 Or App 673, 681, 729 P2d 588 (1986) (League), petitioners argue the time for appealing to this Board or for exhausting local administrative remedies is tolled pending the city's provision of written notice of the challenged decision. In other words, petitioners contend that because the city never provided them with the required written notice of the challenged decision, no exhaustion or appeal requirements have yet been triggered.

ORS 197.825(2)(a) provides the Board's jurisdiction:

> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the Board for review[.]"

Even if we agreed with petitioners that ORS 227.175(10) requires the city to give petitioners written notice of the decision, that would have no bearing on petitioners' duty under ORS 197.825(2)(a) to exhaust the local administrative remedy available under LOC 49.630(1) before appealing to this Board.[3] The question in this appeal is whether

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> 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. * * *" (Emphasis supplied.)

[3]Under our previous decisions in Pienovi v. City of Canby, 16 Or LUBA 604 (1988) (which relies at least in part on League), and Cope v. City of Cannon Beach, 15 Or LUBA 558 (1987), we have held that the time for a person to file a local appeal does not begin to run until such person is given the requisite notice of decision. Whether ORS 197.830(3), which was enacted by the legislature after these cases were decided, affects when the

petitioners may fail to avail themselves of the right to a local appeal of a decision and, rather, appeal the decision directly to this Board. Under ORS 197.825(2)(a), we conclude they may not. Kamppi v. City of Salem, ___ Or LUBA ____ (LUBA No. 91-074, August 26, 1991). This appeal is dismissed.

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time for filing a local appeal begins to run if a person entitled to written notice of the local decision receives actual notice, is a question we do not reach.