

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

3
4 ROY COMRIE,
5 *Petitioner,*

6
7 and

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9 J. VAL TORONTO and REX MOREHOUSE,
10 *Intervenors-Petitioner,*

11
12 vs.

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14 CITY OF PENDLETON,
15 *Respondent,*

16
17 and

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19 OREGON DEPARTMENT OF
20 TRANSPORTATION,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2003-096

24
25 FINAL OPINION
26 AND ORDER

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28 Appeal from City of Pendleton.

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30 D. Rahn Hostetter, Enterprise, represented petitioner.

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32 J. Val Toronto, Pendleton, and Rex Morehouse, Pendleton, represented themselves.

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34 Peter H. Wells, City Attorney, Pendleton, represented respondent.

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36 Bonnie E. Heitsch, Assistant Attorney General, Salem, represented intervenor-
37 respondent.

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39 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
40 participated in the decision.

41
42 REMANDED

12/05/2003

43
44 You are entitled to judicial review of this Order. Judicial review is governed by the
45 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision to reject his local appeal of a planning commission decision to approve a conditional use permit to construct a bridge and overpass.

INTRODUCTION

This is an unusual case. Petitioner appealed to LUBA a city decision approving a conditional use permit for intervenor-respondent Oregon Department of Transportation (ODOT) to construct a bridge and overpass on a state highway in the City of Pendleton. The city planning commission approved the conditional use permit and no local appeal to the city council was pursued. Petitioner did not receive notice of the planning commission decision until well after the time allowed for a local appeal had passed. On receiving notice, petitioner attempted to appeal the planning commission decision to the city council, but the city council rejected the appeal on the grounds that petitioner had not “appeared” before the planning commission and thus was not entitled to a local appeal. Petitioner then appealed the planning commission decision to LUBA.¹

The city and ODOT moved to dismiss the appeal for a number of reasons. We determined in our order denying the motion to dismiss that petitioner did appear at the planning commission hearing and was therefore entitled to notice of the planning commission’s decision. We explained that, because petitioner was not given timely notice of the planning commission’s decision, the city council should have accepted petitioner’s local appeal. We further explained that although the subject of the notice of intent to appeal filed in this case was the planning commission’s decision rather than the decision rejecting petitioner’s local appeal, under existing case law, it was appropriate to treat the notice as appealing the decision rejecting the local appeal. *Comrie v. City of Pendleton*, ___ Or LUBA

¹ For a detailed explanation of the factual and procedural history of this case, see *Comrie v. City of Pendleton*, ___ Or LUBA ___ (LUBA No. 2003-096, Order November 4, 2003).

1 ____ (LUBA No. 2003-096, Order November, 4, 2003) at Slip Op 17-18. Finally, we stated
2 that our resolution of the motion to dismiss appeared to effectively resolve the merits of the
3 appeal as well:

4 “[O]ur resolution of the city’s challenges to petitioner’s standing appears to
5 have effectively resolved the merits of the only issue before us. We held * * *
6 that petitioner appeared before the planning commission, that the city erred in
7 failing to recognize that, and further erred in failing to provide petitioner with
8 required notice of the decision. It follows that the city erred in rejecting
9 petitioner’s local appeal on the grounds that petitioner had not appeared
10 before the planning commission. The June 9, 2003 decision [rejecting
11 petitioner’s local appeal] does not indicate any other basis for rejecting
12 petitioner’s local appeal, or suggest that petitioner had otherwise failed to
13 perfect that appeal. Therefore, it seems that the only conceivable outcome of
14 the present appeal is to remand the city’s June 9, 2003 decision to the city, to
15 provide petitioner with the local appeal to which he is entitled.

16 “However, we have ventured in this order considerably beyond the parties’
17 arguments, and there may be some reason unknown to us why this appeal,
18 even limited to the issue of whether the city correctly rejected petitioner’s
19 local appeal, should be briefed and argued. Accordingly, the parties shall
20 have 14 days from the date of this order to advise the Board whether there is
21 any reason to brief and argue the merits of the city’s June 9, 2003 decision, or
22 whether LUBA should issue a final order and opinion based on the reasoning
23 in this order.” Slip op at 18-19.

24 Rather than respond to our inquiry regarding whether to brief and argue the merits of
25 the city’s June 9, 2003 decision to reject the local appeal, the city filed a response that
26 essentially moves to reconsider our previous order on the motion to dismiss. The city’s
27 response does not respond to the question presented in our order. Petitioner responded to the
28 city’s pleading by objecting that it was unresponsive and asks us to issue a final order and
29 opinion consistent with our previous order.

30 **OPINION**

31 A motion to dismiss for lack of jurisdiction may be filed at any time prior to our
32 issuance of a final opinion and order. *Petersen v. Columbia County*, 33 Or LUBA 253, 256
33 (1997). The opportunity to file such a motion to dismiss, however, does not also include the
34 opportunity to file unlimited motions on the same issue. The city’s “Memorandum in

1 Response to Order” is nothing more than a renewed Motion to Dismiss or Motion to
2 Reconsider our previous order denying the city’s motion to dismiss. By our count, at least 11
3 separate pleadings were filed prior to our order that concerned in some way the standing of
4 petitioner or intervenors. While we have an independent obligation to examine our
5 jurisdiction, we do not believe that obligation extends so far as to give parties unlimited bites
6 at the jurisdictional apple. The city and ODOT had more than sufficient opportunity to fully
7 and thoroughly argue their position regarding jurisdiction, and neither party explains why the
8 evidence and arguments presented in the city’s response could not have been presented
9 earlier. Therefore, we decline to reconsider our order denying the motion to dismiss and will
10 not consider the unresponsive arguments and evidence presented in the city’s “Memorandum
11 in Response to Order.”

12 As we stated in our order, the only apparent outcome of the present appeal would be
13 to remand the decision back to the city to provide petitioner with the local appeal to which he
14 was entitled. We gave the parties an additional 14 days to provide us with their views on
15 whether there was a need to brief and argue the merits of the appeal. As we have discussed,
16 neither the city nor ODOT filed anything responsive to that request that would give us reason
17 to brief and argue the merits.

18 **CONCLUSION**

19 For the reasons stated in our November 4, 2003 order, we find that petitioner
20 appeared below before the planning commission and was therefore entitled to notice of the
21 planning commission’s decision. Because petitioner was not given notice of the decision, the
22 time for filing a local appeal was tolled until he received such notice. Upon receiving such
23 notice, petitioner timely appealed the planning commission’s decision to the city council.
24 Because the city council erroneously rejected that request for a local appeal, the city’s June
25 9,

- 1 2003 decision must be remanded so that petitioner may receive the local appeal to which he
- 2 is entitled.
- 3 The city's decision is remanded.