

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

FEB 1 10 44 AM '85

3	CLAIRE C. YODER,)	
)	
4	Petitioner,)	LUBA No. 84-103
)	
5	vs.)	FINAL OPINION
)	AND ORDER OF DISMISSAL
6	CITY OF WEST LINN,)	
)	
7	Respondent.)	

8 Appeal from City of West Linn.

9	Claire C. Yoder	James Coleman
10	1595 S.W. Bland Street	P.O. Box 369
	West Linn, OR 97068	Lake Oswego, OR 97034
11	Appeared on her	Attorney for
	own behalf	Respondent

12 BAGG, Chief Referee; DuBAY, Referee; KRESSEL, Referee;
13 participated in this decision.

14 DISMISSED 02/01/85

15
16 You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 Respondent moves the Board for an order dismissing this
3 review proceeding. Respondent argues that there is not yet a
4 final decision on the matter which is the subject of
5 petitioner's notice of intent to appeal.

6 On December 24, 1984, petitioner filed a notice of intent
7 to appeal a decision of the City of West Linn granting a
8 conditional use permit and lot line adjustment for an office
9 building in West Linn. The decision became final, according to
10 petitioner, on December 5, 1984. On December 19, 1984,
11 individuals the city describes as "a number of parties to the
12 proceeding" filed a petition for rehearing with the city. The
13 petition for rehearing is provided for in the West Linn
14 Development Code (WLDC), §99.310(B):

15 "The final order of the Council shall be stayed upon
16 the filing of a petition for rehearing, which shall be
17 filed within fourteen (14) days of the notice of the
18 Council's decision and shall contain the matters set
19 forth in Section 99.250. No fee need accompany such
20 petition."

21 Respondent argues that the decision on review did not
22 become final on December 5, 1984, as alleged by petitioner.
23 Respondent argues that the filing of a petition for rehearing
24 stays the council's order. We understand respondent to argue
25 that because the council's decision is stayed, we are without
26 jurisdiction to proceed further.

Our review jurisdiction is limited to final land use
decisions. ORS 197.015(10); ORS 197.825(1). Our rules define

1 "final decision" as a decision which:

2 "...has been reduced to writing and which bears the
3 necessary signatures of the governing body." OAR
661-10-010(3).

4 Respondent does not claim the order in CU84-3 does not meet
5 this definition. Further, as of this date, the city has not
6 acted on the request for reconsideration, nor has it repealed or
7 vacated its order of December 5, 1984. Although the ordinance
8 provides that the order is "stayed" and is not effective to
9 control the use of land, it nonetheless is a final decision
10 under our rule and would, ordinarily, be subject to our
11 review. Columbia River Television v. Multnomah County, 70 Or
12 App 448, 451, ___ P2d ___ (1984), rev allowed, 298 Or 470
13 (1985).

14 Although we believe the order in CU84-3 is a "final
15 decision" under OAR 661-10-010(3), we nevertheless believe this
16 appeal must be dismissed on jurisdictional grounds. Under ORS
17 197.825(2)(a), our jurisdiction

18 "is limited to those cases in which the petitioner has
19 exhausted all remedies available by right before
20 petitioning the Board for review...." ORS
197.825(2)(a).

21 The Community Development Code of the City of West Linn
22 provides that a person dissatisfied with a final order may
23 request rehearing by the approval authority. The code provides:

24 "A. Action by the Approval Authority on appeal or
25 review, known as a 'final order', shall be
26 effective on the fifteenth (15) day from the
filing of the order with the Director under

1 Section 99.110(F).

2 "B. The final order of the Council shall be stayed
3 upon the filing of a petition for rehearing,
4 which shall be filed within fourteen (14) days of
5 the notice of the Council's decision and shall
6 contain the matters set forth in Section 99.250.
7 No fee need accompany such petition.

8 "C. The Council shall decide whether to grant such a
9 petition at its next practicable regular or
10 special meeting based on the grounds set forth in
11 the petition. No petition for rehearing shall be
12 approved unless a majority of the Council
13 consents. No action shall be reheard more than
14 once.

15 "D. No time period for challenging Council action
16 shall commence until the Council has disposed of
17 the Petition for Rehearing.

18 "E. Within seven (7) days of the filing of the final
19 order of Council, or upon a final order on the
20 grant of a petition for rehearing, the Director
21 shall give notice of the final order to all
22 parties to the proceeding, informing them of the
23 date of filing, the opportunity for further
24 remedy by petition for rehearing, the decision
25 rendered and where a copy may be found." WLDC
26 §99.290.

17 Given the above provisions, it is clear petitioner had a
18 right to request reconsideration of the adverse decision made
19 by the city in CU84-3. We interpret WLDC §99.290 to provide a
20 "remedy available by right" as that phrase is used in ORS
21 197.825(2)(a). Because petitioner did not exhaust this remedy
22 before filing this appeal, we do not believe we have
23 jurisdiction to proceed further. See Lyke v. Lane County, 70
24 Or App 82, 688 P2d 411 (1984).

25 In Lyke, supra, we recognized the policy reasons supporting
26 the requirement that a petitioner exhaust all local avenues to

1 obtain a favorable decision. The Court of Appeals quoted the
2 following portion of our opinion.

3 "First, by requiring a petitioner to pursue an
4 available local remedy, we permit the county [in this
5 case the city] decisionmaking process to run its
6 course without interruption. Second, we make it
7 possible for the governing body, which is the
8 legislative source of the ordinances initially applied
9 by the hearings officer [in this case the city
10 council] to clarify and determine factual and policy
11 issues presented by land use controversies. Third, we
12 open the door to the increase possibility of
13 compromise and avoidance of land use litigation.
14 Finally, by our approach under ORS 197.825(2)(a) we
15 promote the opportunity for development of a more
16 complete, well-organized record." Lyke, 70 Or App
17 at 87.

18 We believe dismissal of the present appeal is warranted for
19 the same policy reasons.¹

20 For the reasons discussed above, this matter is dismissed.
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FOOTNOTES

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This case differs in an important respect from Columbia River Television v. Multnomah County, 70 Or App 448, P2d (1984), rev allowed, 298 Or 470 (1985). In that case, petitioner relied on a provision of the Multnomah County Code which specified when a decision of the board was deemed final. The code provision, however, was not consistent with our rule defining finality. OAR 661-10-010(3). Petitioner's reliance on the provision caused it to file an appeal after expiration of the 21 day limit provided for in ORS 197.830(7). Accordingly, we dismissed the appeal. Multnomah County Code (MCC) §11.15.8280(D) provided that the county board's decision

9 "shall be final at the close of business on the tenth
10 day after the decision, findings of fact and
11 conclusions have been filed under Section (C) above,
12 unless the Board on its own motion grants a rehearing
13 under MCC .8285(A).

14 Although the local provision at issue in Columbia River
15 Television involved a rehearing procedure, we did not dismiss
16 the appeal, as we do here, under the exhaustion requirement of
17 ORS 197.825(2)(a). This is because in Columbia River
18 Television we were cited to no provision in the zoning code
19 permitting a potential petitioner to request the governing body
20 to undertake a rehearing. Rehearing was available exclusively
21 upon motion of the county board. Thus, in contrast to this
22 case, the Multnomah County Code provided no remedy "available
23 by right" under ORS 197.825(2)(a) to the petitioner. Because
24 such a remedy is provided in the City of West Linn Development
25 Code, the present appeal must be dismissed under ORS
26 197.825(2)(a).

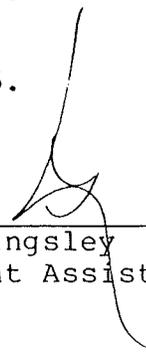
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order of Dismissal for LUBA No. 84-103, on February 1, 1985, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Claire C. Yoder
1595 S.W. Bland Street
West Linn, OR 97068

James Coleman
P.O. Box 369
Lake Oswego, OR 97034

Dated this 1st day of February, 1985.



L. Kay Kingsley
Management Assistant