

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals approval of a planned unit development
4 by the City of Happy Valley. Shortly after the notice of
5 intent to appeal was filed, Respondent EnStone Enterprises,
6 Ltd., filed a motion to dismiss on the ground that petitioner's
7 notice of intent to appeal was not filed within the 21 day
8 period provided under ORS 197.830(7) and OAR 661-10-015(1).¹

9 FACTS

10 Approval of the planned unit development was first made by
11 the City of Happy Valley Planning Commission. Petitioner
12 herein, Lynn Harris, appealed the planning commission's approval
13 to the city council. The city council heard the appeal, and at
14 the conclusion at its hearing on November 20, 1984, voted to
15 deny the appeal and accept the planning commission's approval.
16 The city council entered an order to this effect on November
17 26, 1984.

18 In December, 1984, petitioner obtained a copy of the
19 unapproved minutes of the council meeting but was not provided
20 with a copy of the order or any other notice the city had acted
21 on the appeal. The minutes of the city council's meeting note
22 the motion and vote to uphold the planning commission
23 decision. The minutes were approved at the city council's next
24 meeting on January 7, 1985. On January 22, 1985, petitioner
25 filed his notice of intent to appeal.

26 Respondent asserts the decision on review was final on

1 November 26, 1984, upon the entry of the city's order.
2 Accordingly, petitioner claims the 21 day filing deadline
3 expired on December 17, 1984.

4 Petitioner argues the deadline for filing was January 28,
5 1985, 21 days after approval of the minutes of the November
6 hearing. In support of this he relies on ORS 227.173(3) which
7 provides:

8 "Written notice of the approval or denial shall be
9 given to all parties to the proceeding."

10 Petitioner construes the statute to imply that the period for
11 filing an appeal to LUBA does not begin to run until the
12 statute is satisfied.

13 We believe this case must be dismissed. As noted, ORS
14 197.830(7) requires that the notice of intent to appeal to be
15 filed within 21 days after the challenged decision becomes
16 final. Our rules define finality as the date the decision is
17 reduced to writing and bears the necessary signatures of the
18 governing body. OAR 660-10-010(3). The definitional rule has
19 recently been upheld. Columbia Television v. Multnomah County,
20 70 Or App 448, ___ P2d ___ (1984), review allowed, 298 Or 470.
21 If we apply that rule to the undisputed facts, the appeal
22 period began in this case on November 26, 1984, when the mayor
23 of Happy Valley signed the final order. Under ORS 197.830(7),
24 the deadline fell on December 17, 1984, more than a month
25 before the notice of intent to appeal was filed.

26 The argument is made that our definitional rule cannot

1 control because of ORS 227.173(3). As noted, that law requires
2 written notice of approval or denial of a permit to be given to
3 all parties to the permit proceeding. Petitioner's view, that
4 the period for appeal to this Board could not begin to run
5 until such notice has been provided derives some support from
6 Bryant v. Clackamas Co., 56 Or App 442, 643 P2d 649 (1982).²

7 We need not decide whether petitioner's interpretation of
8 ORS 227.173(3) (i.e., that the period for appeal to LUBA does
9 not begin to run) is correct. In this case, whether the
10 commencement of the appeal period began when (1) the final
11 order was signed by the mayor (satisfying OAR 660-10-010(3), or
12 (2) when written notice of the decision (in this case, minutes
13 of the November 20 hearing) was given to petitioner (satisfying
14 ORS 227.173(3)),³ the appeal was not timely filed.
15 Therefore, the appeal must be dismissed.

16 Dismissed.

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FOOTNOTES

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4 OAR 661-10-015(1) provides:

5 "Filing of Notice: The Notice must be delivered to
6 and received by the Board for filing on or before the
7 21st day after the date the decision sought to be
8 reviewed becomes final. A Notice received after that
9 day will not be timely filed, and the appeal will be
dismissed. The Notice must be served on the governing
body, the governing body's legal counsel, and all
persons identified in the Notice as required by rule
661-10-015(2)(f) within 21 days from the date of the
land use decision."

10 ORS 197.830(7) provides:

11 "A notice of intent to appeal a land use decision
12 shall be filed not later than 21 days after the date
13 the decision sought to be reviewed becomes final.
14 Copies of the notice shall be served upon the local
15 government, special district or state agency and the
16 applicant of record, if any, in the local government,
17 special district or state agency proceeding. The
18 notice shall be served and filed in the form and
19 manner prescribed by rule of the board and shall be
accompanied by a filing fee of \$50 and a deposit for
costs to be established by the board. If a petition
for review is not filed with the board as required in
subsections (8) and (9) of this section, the filing
fee and deposit shall be awarded to the local
government, special district or state agency as cost
of preparation of the record."

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21 In Bryant, supra, however, the court declined to find
22 that notice of a decision was a necessary prerequisite to
23 starting the appeal clock running. We had urged such a
24 result in our review of the same case. See 1000 Friends
of Oregon v. Clackamas County, 3 Or LUBA 203 (1981).
Instead, the court found a local ordinance providing for
oral notice to be controlled by a statute similar to ORS
227.173(3). See ORS 215.416(6).

25 The issue of whether a petitioner may file a notice of
26 intent to appeal with this Board in excess of 21 days
beyond the date the decision became final is still open to
question. In McCoy v. Marion County, 69 Or App 522, 686

1 P2d 1059 (1984), we suggested that the filing of a notice
2 of intent to appeal might be timely if made within 21 days
3 of the time a potential petitioner received actual notice
4 that a land use decision had been made. We believe such a
5 holding would be in keeping with the apparent intent of
6 ORS 227.173(3) requiring written notice to all parties to
7 the proceeding of the approval or denial of a permit
8 application. There would be little point in requiring
9 written notice of the decision if that notice did not
10 serve some purpose other than to satisfy curiosity.

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ORS 227.173(3) does not specify the kind of written
notice which "shall be given to all parties to the
proceeding," nor does it specify the manner in which
notice must be given. While we recognize the city had not
yet approved the minutes handed to petitioner, we do not
believe this fact alone means the minutes constituted no
notice of the council's "approval or denial." We are
cited to no authority to suggest that notation of a motion
and vote denying petitioner's appeal in unapproved minutes
was not written notice of that denial. The minutes
constituted notice sufficient to satisfy ORS 227.173(3).

Compare Ludwick v. Yamhill Co., ___ Or App ___, ___
P2d ___ (1985) (Slip Opinion of 2/27/85) wherein a statute
required a detailed mailed notice to the parties. See ORS
197.615(2). The statute requires the notice not only
describe the action taken, but also "[e]xplain the
requirements for appealing the action of the local
government under ORS 197.832, 197.845." ORS
197.615(2)(b)(D).