

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

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HOUSING DEVELOPMENT CORP.
OF WASHINGTON COUNTY,
a non-profit corporation,

Petitioner,

v.

CITY OF HILLSBORO,

Respondent.

LUBA NO. 81-128

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

Timothy V. Ramis, Portland, filed a petition for review and argued the cause for Petitioner. With him on the petition were O'Donnell, Sullivan & Ramis.

Carrell Bradley, Hillsboro, filed a brief and argued the cause for Respondent. With him on the brief were Schwenn, Bradley & Batchelor.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

Reversed 3/30/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioner appeals a City of Hillsboro interpretation of
4 multi-family housing provisions in the city's zoning
5 ordinance. The interpretation requires that petitioners obtain
6 a conditional use permit for a migrant farmworker housing
7 development in an A-2 (multi-family) zone.

8 FACTS

9 In the spring of 1981, the Housing Development Corporation
10 of Washington County completed a pre-application to develop
11 approximately 90 dwelling units in Western Washington County to
12 provide housing for seasonally employed farm workers. In
13 preparation of obtaining federal funds for the project, the
14 petitioner prepared a survey entitled "The Migrant Housing
15 Planning Study." The survey makes conclusions regarding the
16 need for migrant farm worker housing. The study has not been
17 submitted to the City of Hillsboro for inclusion in the City's
18 comprehensive plan inventories.

19 The planning commission for the City of Hillsboro advised
20 petitioners that this development would be subject to the
21 city's conditional use procedure. The petitioner sought review
22 of this determination before the Hillsboro City Council, and
23 the council determined that the farmworker housing project as
24 proposed was not contemplated by the zoning ordinance as an
25 outright permitted use. The council found that although
26 multi-family housing is a permitted use in the A-2 zone, the

1 particular character of migrant farmworker housing would
2 require a conditional use permit. The city viewed the permit
3 as necessary to enable the city to effectively review the
4 project's compliance with the Hillsboro Comprehensive Plan.

5 The city issued findings and conclusions in support of its
6 decision. The city found, among other things, that the
7 proposed use was "seasonal in nature, being open for six months
8 and being closed for six months, and is intended to exclusively
9 serve seasonal migrant farmworker clients, defined by the
10 proponents in the Migrant Housing Planning Study as farmworkers
11 who come to Washington County to harvest the berry and cucumber
12 crops." The city found that the length of stay for the workers
13 was three to six months and found the migrant housing planning
14 study "noted that 62 percent of the migrant farmworkers in
15 Washington County stay for four to six months and, for 62
16 percent, this was their first visit to Washington County." The
17 county found that this "seasonal operation" resulted in a
18 "higher degree of impermanence and thus a greater impact than a
19 typical multi-family development."

20 The county also found that the average size of the migrant
21 family household was larger than the average city multi-family
22 household. 6.3 persons per household was the average among
23 Washington County farmworker families, and 2.38 people per
24 household was the average for the city multi-family
25 households.

26 The city found a number of its comprehensive plan policies

1 to be relevant. Policy (F) requires that low-income housing
2 conform to other housing policies (requiring energy efficiency,
3 sound construction, attractive appearance with normal
4 maintenance, safe, etc.) and not be "so concentrated as to
5 create a recognizable or exclusively low income district."

6 One of the county's housing implementation measures
7 requires the county to cooperate with the Washington County
8 Housing Authority, regional agencies, the State Housing
9 Division, HUD, FmHA and other agencies for the provision of low
10 to moderate income housing. The county went on to say that one
11 such agency, the Farmers Home Administration (FmHA), has
12 requirements for projects such as the one proposed by the
13 petitioners that include a project management plan. The
14 project management plan must address staffing, marketing,
15 tenants selection, ineligible tenants, lease or occupancy
16 agreements, counseling services, and a number of other items
17 that have a bearing on the operation of any housing project.
18 The county found, given the "critical importance of the design
19 and management of the project, a city review of the design and
20 management of the project is warranted and a conditional use
21 application is the only method in the zoning ordinance to
22 review a site specific use or project."

23 In support of this conclusion that the conditional use
24 application process was the only method to allow for review,
25 the city noted that it had previously found a shelter home to
26 be a conditional use within a multi-family district. The city

1 explained in its findings that the shelter home determination
2 was based upon a similar process "and a showing that certain
3 conditions of shelter homes support that decision." Those
4 conditions included the inherent transient nature of the
5 development, greater than typical with multi-family
6 development, the public welfare object involved, the non-profit
7 ownership and the density and number of clients served.

8 The city concluded that the proposed migrant farmworker
9 housing project was not specifically named in the zoning
10 ordinance, that it was similar in intensity and impact to a
11 shelter house, and that the use is a "higher density
12 residential use and an allowable conditional use in the
13 multi-family residential zones."

14 An appeal to the Land Use Board of Appeals followed.¹

15 NON-GOAL ISSUES

16 First Assignment of Error

17 "The decision by the city, to require that housing
18 constructed for migrant farmworkers be regulated by
19 conditional use permit, is a violation of the city's
comprehensive plan goals, policies, and implementation
measures."

20 Petitioner begins by citing the city's housing goal which
21 is to provide for the housing needs of the citizens of
22 Hillsboro and surrounding communities.² Petitioner states
23 that the city has had a migrant farm worker population for more
24 than 20 years. To subject the migrant population's housing
25 needs to a conditional use permit would be to discourage the
26 availability of the housing types which the migrant workers

1 need, according to petitioner. Petitioner cites housing
2 policies it believes support the type of development proposed
3 by the petitioner.

4 Implicit in the petitioner's argument is the view that
5 migrant farmworker housing is a needed housing type within the
6 City of Hillsboro. Also, within petitioner's argument is the
7 belief that a conditional use application process works to
8 discourage and deny the object of the conditional use.
9 Petitioner says highly discretionary criteria used by the city
10 allow the city to act as it pleases in violation of its own
11 housing goal. Petitioner states the city's housing goal and
12 its policies require that the city make housing available for
13 the citizens by encouraging a variety of housing types in
14 sufficient numbers and at prices which are commensurate with
15 the financial abilities of the community. The conditional use
16 process applied to migrant farmworker housing flies in the face
17 of this policy.

18 We understand the city to deny that migrant farmworker
19 housing is a "needed housing type." The respondent also states
20 that the petitioner has not cited any factual base to support
21 its conclusion that subjecting migrant farmworker housing to
22 the conditional use process amounts to discriminating
23 treatment.

24 The comprehensive plan for the City of Hillsboro does not
25 recognize migrant farmworker housing as a needed housing type.
26 The inventories for the plan do not recognize migrant

1 farmworker housing as a needed housing type. As we noted
2 earlier, "the migrant housing planning study" submitted by
3 petitioners has not been given to the City of Hillsboro for
4 inclusion in the city's comprehensive plan inventories.
5 Without recognition in the plan or supporting documents of a
6 need for migrant farmworker housing, we do not view the city to
7 be in violation of its plan if it ignores migrant farmworker
8 housing in an action taken under its plan. There is nothing
9 inconsistent in the city's treatment of migrant farmworker
10 housing in this case, and the city's treatment (or perhaps
11 nontreatment) of migrant farmworker housing in its
12 comprehensive plan.

13 Where petitioner may have identified migrant farmworker
14 housing as a variety of housing that should be addressed in the
15 comprehensive plan, the appropriate action is a plan amendment
16 or, perhaps, an allegation that any action taken under the plan
17 is inadequate because the plan itself is inadequate.

18 We note also that petitioner cites us to no authority and
19 we are aware of no authority to suggest that a conditional use
20 process predisposes an application to denial. Where, however,
21 a jurisdiction has found that a particular housing type is a
22 needed housing type, discretionary conditional use criteria are
23 indeed prohibited. See ORS 197.303 et seq.³ The city has
24 made no finding in its comprehensive plan and has not included
25 in its inventories migrant farmworker housing as a needed
26 housing type.

1 The first assignment of error is denied.

2 Second Assignment of Error

3 "The city erred in failing to find that the proposed
4 development does not meet the zoning ordinance
5 definition for multi-family dwelling."

6 We understand petitioner to say that the city should have
7 found the proposed development to be an outright permitted
8 multi-family use. Petitioner here argues the city has made no
9 attempt to determine whether this proposed development is or is
10 not a multi-family housing development. The petitioner says
11 whether "the proposed development may be occupied only on a
12 seasonal basis does not automatically disqualify it from the
13 definition provided by the ordinance."

14 The city zoning ordinance defines multi-family dwelling as
15 a "detached building containing three or more dwelling units in
16 one ownership." Zoning Ordinance of the City of Hillsboro
17 II-6.3(3)(9).⁴ Petitioner argues that the proposed
18 development meets every element of the definition. Petitioner
19 claims the city included criteria in its written order such as
20 transient residency, a public welfare objective, non-profit
21 ownership, a management plan and other attributes that are not
22 found in the simple definition of multi-family dwelling
23 included in the zoning ordinance. Petitioner's arguments
24 together allege the city has impermissibly amended its
25 ordinances.

26 Respondent suggests that to apply the reasoning used by a
petitioner would require hotels, motels, jails, restitution

1 centers and shelter homes to be subject to outright permitted
2 uses. Respondent says the term "multi-family" dwelling is not
3 a term with precise meaning capable of a simple fact
4 application. The city argues the term "multi-family" dwelling
5 is nothing more than a generic term utilized to identify a type
6 of housing which the city must refine to meet its zoning
7 policies. Respondent says it so refined the term in the
8 proceeding under appeal.

9 Respondent cites Springfield Education District v. The
10 School District, 290 Or 217, ___ P2d ___ (1980) for
11 theoretical support for its argument. In the Springfield case,
12 the court delineated three classifications of terms requiring
13 different approaches:

- 14 "(1) Precise terms requiring only fact finding and
15 review based upon substantial evidence.
16
17 "(2) Inexact terms requiring interpretation and review
18 for consistency with legislative policy..
19
20 "(3) Delegated terms requiring a legislative policy
21 determination by the implementing body and review
22 to determine whether the policy implemented was
23 within the delegatory powers of the governing
24 body."

25 The city concludes that the term is a delegative term
26 pursuant to the third category, and states that it is the
city's task to refine the term by applying it to various fact
situations. The city argues that it did so in this case, and
the function of the Land Use Board of Appeals "is to ascertain
whether the refinement and application to specific facts falls
within the generally expressed policies of the statute."

1 Theland v. Multnomah County, ____ Or LUBA ____ (1981). The
2 city states that in making the determination, LUBA must be
3 bound by the local government's interpretation, providing it is
4 reasonable (citing Tribbett v. Benton County, 2 Or LUBA 161
5 (1981). See also City of Gresham v. Realty Investment Company
6 and Tara Corporation, ____ Or App ____ (Slip Opinion ____).

7 In accordance with this criteria, the city states that it
8 had substantial evidence and properly construed the applicable
9 law. The city had petitioner's own study identifying the
10 project as "specialty" housing. Record 055. Section 5 of the
11 study reveals that the seasonal migrant housing sites present a
12 "special set of circumstances" including the possibility that
13 the six-month vacancy of the project would make the project a
14 target of vandalism. Again, the city cites Section 5 of the
15 Housing Authority's own study.

16 The city's argument is that the project is unique and does
17 not fit into the existing multi-family housing definition.
18 Other special kinds of multiple occupancy are treated
19 distinctly in the Zoning Ordinance, according to the city. For
20 example the city subjects shelter homes to conditional use
21 criteria. The city believes it was required to evaluate the
22 impact of the proposal upon its housing goal needs and could
23 only do so through a conditional use review process.

24 We do not agree that the term "multi-family" housing is
25 imprecise. As mentioned earlier, the city defines "dwelling,
26 multi-family" as "a detached building containing three or more

1 dwelling units in one ownership." This project, as we
2 understand it, proposes to create several dwelling units of
3 precisely this kind. Under the test in Springfield, all the
4 city had to do was apply the facts to the term to see whether
5 or not the term is applicable. We believe the term is
6 applicable, but our inquiry does not stop here.

7 Given the project meets the city's definition of
8 "multi-family" dwellings, the city had no need (and no
9 authority) to invoke Section 89 of its Zoning Ordinance. The
10 section is only invoked when a proposed use is not one of the
11 allowed uses specifically mentioned in the zone. Section 89 of
12 the Hillsboro Zoning Ordinance authorizes uses to be included
13 in the zone "if the use is of the same general type and is
14 similar to the allowed uses." The section is not applicable
15 when the use is one of the allowed uses in the zone.

16 We are not holding the city was without alternatives, such
17 as an ordinance amendment. We only hold the city's ordinance,
18 as presently written, does not allow for the flexibility with
19 this particular variety of housing that the city attempted to
20 exercise in this case.

21 Third Assignment of Error

22 "The city's decision is a violation of equal
23 protection provisions of the state and federal
constitutions."

24 Because of our holding under assignment of error no. 2, it
25 is not necessary for us to reach petitioner's second assignment
26 of error.

1 GOAL ISSUES

2 Petitioner makes four assignments of error based upon
3 alleged failures to comply with statewide planning goals.⁵

4 The respondent city has submitted a motion to dismiss the last
5 four assignments of error on the ground that the petitioner's
6 complaints were subject to LCDC consideration in the
7 acknowledgment proceeding now pending. Petitioner cites
8 Fujimoto v. Land Use Board of Appeals, 52 Or App 75, ___
9 P2d ___ (1981), for the proposition that the Board is without
10 jurisdiction to consider goal violations already subject to
11 consideration by the commission.

12 The petitioner states that reliance on Fujimoto, supra, is
13 misplaced because the city has not received acknowledgment.
14 Indeed, the continuance order found that the city did not
15 comply with Goal 10. Petitioner claims that the commission has
16 declined to rule on the Goal 10 issues until the Land Use Board
17 has ruled on the city's interpretation of its zoning
18 ordinance. Petitioner points to a motion by Land Conservation
19 and Development Commission member Squier as follows:

20 "I feel very strongly that, if in fact we had within
21 the Plan submission something that did in fact
22 separate this group off from other low-income,
23 multi-family housing provision and make it a
24 conditional use under discretionary standards, there
25 is no question but that I would not support that as
26 something that could meet the goal. I think I'm going
to go ahead and vote for the staff recommendation at
this point because, as far as I can see, we really
don't have this before us. There really isn't
anything in the Plan submission that made that policy
decision for the city, but I hope that the city
understands very clearly that I think there is a real

1 goal issue there and, however you handle it when you
2 get through this process * * * *

3 The acknowledgment order and report of February 17, 1981
4 found that the City of Hillsboro did not comply with Goal 10.
5 However, the commission stated that the existence of Section 89
6 allowing the city to interpret its ordinance "does not
7 constitute a Goal 10 violation." The commission went on to say
8 that the issue before the commission "is whether the city has
9 abused its authority to interpret the definitions in its zoning
10 ordinance." The commission claimed that this issue was a
11 matter of law before the Land Use Board of Appeals. The
12 commission then required the city to make certain changes in
13 its plan in order to comply with Goal 10, but none of the
14 changes concerned migrant housing.

15 We conclude from the commission's order that the city may
16 apply section 89 of its ordinance to subject migrant farm
17 housing to a conditional use process given a plan data base
18 that lists no need for migrant farm housing. It is not clear
19 to us that the commission has ruled on whether the City of
20 Hillsboro erred in failing to identify migrant housing as a
21 needed housing type in its comprehensive plan. We view that
22 issue to rest with the commission in the acknowledgment
23 review. The issue is not before us in this case.

24 The issues framed by petitioners' response to the city's
25 motion to dismiss (supra at 14) may be summarized as three
26 issues. We answer each allegation in order.

1 "1. The issues raised should be considered
2 throughout [sic] the petition process because the
3 acknowledgment process does not review interpretations
4 made subsequent to submission of materials for
5 acknowledgment;⁶

6 "2. LUBA must determine whether the city can
7 interpret its plan and ordinances as it has in this
8 case before a goal issue even arises; and

9 "3. If LUBA permits the city to interpret its
10 plan and ordinances to treat farmworker housing
11 differently than other low-income multi-family
12 housing, the Commission has a clear goal issue to
13 decide."

14 (1) We believe the commission has already considered the
15 city's interpretation of its ordinance, whether or not the
16 interpretation was made after the initial submittal of the
17 city's plan for acknowledgment. We do not believe it would be
18 at all helpful for us to consider the city's interpretation of
19 its ordinance against statewide land use goals as we found the
20 city's use of the process to be in error in this case.

21 (2) We conclude that the city was mistaken in using
22 Section 89 of its ordinance as it has in this case. Given that
23 conclusion, the next move is up to the city, and it would be
24 pointless to try to review potential city actions at this
25 time. We believe the city's time would be better spent
26 evaluating its ordinances with an eye toward acknowledgment.

27 (3) We understand the petitioner to say that the "clear
28 goal issue" for the commission to decide is whether the city
29 should have considered migrant farmworker housing as a separate
30 class of needed housing types. As we said earlier, we believe

1 that issue is before the commission in the acknowledgment
2 process, and it is not an issue that is now before us. In any
3 event, we need not decide this issue to divide this case.

4 The land decision of the City of Hillsboro is reversed.

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FOOTNOTES

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4 No building permit application has been filed, and no
5 conditional use permit has been sought. The issue before us is
6 the city's determination that the proposal requires a
7 conditional use permit.

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10 "Housing.

11 "(I) Goal. To provide for the housing needs of the
12 citizens of Hillsboro and surrounding community by
13 encouraging the construction, maintenance, development
14 and availability of a variety of housing types, in
15 sufficient number and at price ranges and rent levels
16 which are commensurate with the financial capability
17 of the community's residents."

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19 3
20 The St. Helens' Policy requires objective criteria in
21 discretionary permit decisions and was first announced in a
22 policy paper issued in July of 1979. The policy was
23 incorporated into law by passage of ORS 197.295 to ORS 197.307.

24 "197.303 "'Needed housing' defined. (1) As
25 used in ORS 197.307, unto the beginning of the first
26 periodic review of a local government's acknowledged
comprehensive plan, 'needed housing' means housing
types determined to meet the need shown for housing
within an urban growth boundary at particularly price
ranges and rent levels. On and after the beginning of
the first periodic review of a local government's
acknowledged comprehensive plan, 'needed housing' also
means housing that includes, but is not limited to,
attached and detached single-family housing and
multiple family housing for both owner and renter
occupancy and manufactured homes, as defined in ORS
197.295, located in either mobile home parks or
subdivisions.

"(2) Subsection (1) of this section shall not
apply to:

"(a) A city with a population of less than 2,500.

1 "(b) A county with a population of less than
2 15,000.

3 "(3) A local government may take an exception to
4 subsection (1) of this section in the same manner that
5 an exception may be taken under the goals.

6 "197.307 Effect of need for certain housing in
7 urban growth areas. (1) The availability of housing
8 opportunities for persons of lower, middle and fixed
9 income is a matter of state-wide concern.

10 "(2) When a need has been shown for housing
11 within an urban growth boundary at particular price
12 ranges and rent levels, needed housing shall be
13 permitted in a zone or zones with sufficient buildable
14 land to satisfy that need.

15 "(3) Subsection (2) of this section shall not be
16 construed as an infringement on a local government's
17 prerogative to:

18 "(a) Set approval standards under which a
19 particular housing type is permitted outright;

20 "(b) Impose special conditions upon approval of
21 a specific development proposal; or

22 "(c) Establish approval procedures.

23 "(4) Any approval standards, special conditions
24 and the procedures for approval adopted by a local
25 government shall be clear and objective and shall not
26 have the effect, either in themselves or cumulatively,
27 of discouraging needed housing through unreasonable
28 cost or delay."

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31 4 "Dwelling unit," in pertinent part, is defined as
32 "[o]ne or more rooms designed for occupancy by one family
33 and not having more than one cooking facility." Zoning
34 Ordinance at II-6.3(3)(11).

35

36 5 The four assignments of error based upon alleged
37 failures to comply with the statewide planning goals are
38 as follows:

39 "Fourth Assignment of Error

1 "The City's findings in support of this decision
2 failed to adequately address statewide planning goals
as required by law.

3 "Fifth Assignment of Error

4 "The decision and the plan violate Goals No. 2, 9 and
5 10 by failing to provide adequate factual base and
consideration of policies and alternatives.

6 "Sixth Assignment of Error

7 "Goals 2, 9 and 10 are violated by effectively
8 amending the implementation ordinance without the
required documentation and review process.

9 "Seventh Assignment of Error

10 "City's decision violates Goal 10 requirements by
11 placing needed housing under a review and approval
process governed by nonobjective criteria."

12 We do not address petitioner's allegations of goal
13 violations because we find the city to have erred in use
of Section 89 in this case. Where the proceeding is found
14 defective as here, the goal issues raised are of little
consequence. Also, the goal issues relevant to migrant
15 farmworker housing will be dealt with in the
acknowledgment proceeding.

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18 We understand petitioner to say we should review this
19 decision because it was made after the city submitted its
plan for acknowledgment. We note, however, that the
20 commission review specifically considered this decision.
See LCDC acknowledgment report of January 15, 1982, pp
18-26.

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

3 HOUSING DEVELOPMENT CORP.)
4 OF WASHINGTON COUNTY,)
5 a non-profit corporation,) LUBA NO. 81-128
6 Petitioner,)
7) ORDER ON MOTION
8) TO DISMISS
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 Respondent.

9 This matter is before the Board on the motion of Respondent
10 City of Hillsboro requesting that the Board dismiss the above
11 entitled action because the petition for review was filed after
12 the time allowed by LUBA Rule 7A.

13 Respondent notes that the petition for review was filed on
14 December 28, 1981 at 5:11 p.m., the last day allowed for
15 filing. Board Rule 7A provides that a petition for review must
16 be filed within 20 days after the date the record is received
17 by the Board. This provision echoes Oregon Laws 1979, ch 772,
18 sec 4(6), requiring the petition for review be filed within 20
19 days of the date of transmittal of the record.

20 Respondent adds that the Board's rules clearly establish
21 the method of service and hours within which the Board will
22 operate. Rule 16(J) states that the hours of operation of the
23 Board shall be from 8:30 a.m. to 5:00 p.m. Monday through
24 Friday, and an allowance for filing beyond those hours "could
25 give rise to staff personnel keeping the office open to
26 accommodate parties, whether it be 5:11 p.m. or 11:59 p.m."

1 Respondent does not cite the recent case of Gordon v.
2 Beaverton, 52 Or App 937 (1981), wherein the court held that
3 dismissal of a petition for review was required where the
4 petition arrived after the statutorily specified date.

5 Additionally, respondent states that Rule 7(A) provides the
6 petition must be filed on the governing body, and it does not
7 specify that service may be made on the governing body's
8 attorney. In this case, the petition was received in the
9 offices of the law firm serving the city attorney, but no
10 petition was received by the City of Hillsboro itself.
11 Petitioner claims that the petition was not filed with the
12 governing body as required.

13 The Housing Development answers firstly that Rule 14(B)
14 requires that such challenges be served on the adverse party
15 within ten days of the moving parties obtaining knowledge of
16 the alleged failure to follow the rules, and the respondent's
17 motion is, therefore, late. We note at the outset that
18 challenges to the Board's power to act may be filed at any
19 time, and failure to file a motion to dismiss based upon a late
20 petition is not subject to Rule 14(B).

21 Petitioner secondly states that there has been no prejudice
22 to the city and cites LUBA Rule 2 providing technical
23 violations of rules that don't affect substantial rights shall
24 not interfere with the review of a petition. Petitioner says
25 there is no prejudice to the city, and the motion should,
26 therefore, be denied. The petitioner then advises the reason

1 for the delay in filing the petition was due to an accident on
2 Interstate 5.

3 We have been cited to no authority to suggest to us that a
4 filing made and accepted by an administrative body is not
5 timely if made on the proper date but after the hour for the
6 close of business. In this instance, a Board staff person was
7 in the office and did receive the petition for review and
8 stamped it as having been received on the appropriate day and
9 11 minutes after 5:00 p.m. The Board's office hours are
10 established by Board Rule, not by statute. The acceptance of
11 the petition after the hour of closing established by the rule
12 results in a violation of our rule and not state law. As we
13 are an administrative agency, our power to act is controlled by
14 state law. Clearly, we have no authority to accept the
15 petition after the 20 day limit provided by statute, but it is
16 not so clear that we may not accept a petition after the usual
17 close of business established by our own rule.

18 Because we have been cited to no authority requiring us to
19 take the extreme step of dismissing a petition upon a violation
20 of a Board Rule and because we can find no prejudice by
21 violation of our rule against the city, we decline to dismiss
22 the case. However, as the issue concerns the Board's authority
23 to act, the parties may present argument supported with
24 authority on this issue at the time set for oral argument.

25 Dated this 12th day of February, 1982.