

LAND USE
BOARD OF APPEALS

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

JUN 30 12 00 PM '82

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3 JAMES M. DeWOLFE,)

4 Petitioner,)

5 vs.)

6 CLACKAMAS COUNTY)
7 BOARD OF COMMISSIONERS,)
8 and OLIVER L. JONES,)

9 Respondents.)

LUBA No. 82-011

FINAL OPINION
(ORDER OF DISMISSAL)

10 Appeal from Clackamas County.

11 James M. DeWolfe
12 9511 S.E. 79th Avenue
13 Milwaukie, OR 97222

Michael E. Judd
906 Main Street
Oregon City, OR 97045
Attorney for Respondent
County

14 John C. Aniker, Jr.
15 702 Main Street
16 Oregon City, OR 97045
Attorney for Respondent
Jones

17 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee.

18 DISMISSED

6/30/82

19
20 You are entitled to judicial review of this Order.
21 Judicial review is governed by the provisions of Oregon Laws
22 1979, ch 772, sec 6(a).
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1 REYNOLDS, Chief Referee.

2 Respondent-intervenor Oliver L. Jones has moved the Board
3 for an order dismissing the notice of intent to appeal filed in
4 the above captioned matter. Respondent-intervenor contends the
5 notice was not filed within 30 days of the date of the county's
6 land use decision. Respondent-intervenor says that the notice
7 of intent to appeal was filed February 17, 1982, but the
8 county's decision was dated and entered January 11, 1982.

9 Petitioner DeWolfe sets forth two reasons why the motion
10 should not be granted. The first reason is that the order of
11 the county which appears in the record is undated and that,
12 accordingly, petitioner could not be said to have filed the
13 notice of intent to appeal more than 30 days from the date of
14 the order. Petitioner's second reason is that petitioner
15 requested that the county reconsider its decision, that such
16 reconsideration was denied and petitioner filed a notice of
17 intent to appeal within 30 days of the date of the county's
18 denial of his request for reconsideration. For either of the
19 above reasons, petitioner claims the notice of intent to appeal
20 was timely filed.

21 Petitioner is correct that the county's order which appears
22 in the record is undated. The county voted on December 21,
23 1981, to uphold the planning commission's decision. A written
24 order was subsequently prepared and signed by the county
25 commissioners, but that order was not dated when the county
26 commissioners signed the order. Respondent-intervenor has

1 attached to his motion to dismiss a copy of the county's order
2 bearing the date of January 11, 1982. The copy of the order
3 which appears in the record has a Clackamas County filing stamp
4 which indicates that the order was filed with the county clerk
5 on January 12, 1982. Whether the date the order became final
6 was January 11, 1982, the date which appears on the copy of the
7 order submitted by respondent-intervenor, or January 12, 1982,
8 the date the order was filed with the county clerk, is of
9 little import as far as petitioner is concerned. If the 30 day
10 period begins to run from January 12, 1982 instead of January
11 11, 1982 (Cf ORS 19.026), petitioner has filed the notice of
12 intent to appeal more than 30 days from the date of the
13 county's decision and we must dismiss the appeal.

14 However, we conclude that because petitioner requested
15 reconsideration of the county's order and petitioner's notice
16 of intent to appeal was filed within 30 days of the date the
17 county denied the request for reconsideration, petitioner's
18 notice of intent to appeal was timely filed. In Meyer v
19 Washington County, (LUBA No. 80-146, Order on Motion to
20 Dismiss, Unreported), petitioner filed the notice of intent to
21 appeal within 30 days of the date his request for
22 reconsideration was denied. Requesting reconsideration was a
23 permissive procedure under the Washington County Zoning
24 Ordinance. We held that even though the notice of intent to
25 appeal was filed more than 30 days from the date the county
26 made its initial decision, petitioner had timely filed the

1 notice of intent to appeal because it was filed within 30 days
2 of the date the county denied the request for reconsideration.

3 We said:

4 "It is our view that a petitioner exercising an
5 optional rehearing provision at a local level does not
6 thereby forego his appeal to us. If appeals are
7 provided for at a local level, and if the local
8 jurisdiction is required to act on such a local appeal
9 by affirming the decision, reversing the decision or
10 even denying a new hearing on the decision, we believe
11 that suspends the time for the filing of an appeal to
12 us until the county has acted pursuant to its own
13 internal appeals procedures. To say otherwise would
14 be discouraging an individual from exercising all of
15 his options on a local level before seeking review by
16 this Board. We believe that effect would be contrary
17 to the purpose we believe exists in Oregon Laws 1979,
18 chapter 772, and in the general philosophy in Oregon
19 that land use planning is a local matter subject to
20 state guidance. See ORS 197.005, 197.010." Slip Op
21 at pages 6-7.

22 We believe the above stated rationale applies equally to
23 this case. Petitioner requested reconsideration of the
24 county's decision pursuant to Clackamas County Zoning
25 Ordinance, Section 1304.09, permitting the filing of a request
26 for reconsideration.¹ The county set the request for
reconsideration for hearing. At the conclusion of the hearing
the county denied the request for reconsideration. Petitioner
filed the notice of intent to appeal within 30 days of the
county's decision to deny reconsideration. We believe,
accordingly, that the notice of intent to appeal was timely
filed.

However, we conclude this appeal is now moot in view of
events which have occurred since respondent county's denial of

1 petitioner's request for reconsideration. On February 10,
2 1982, petitioner filed a second request for rehearing with the
3 county.² This second request was actually pending before the
4 county when petitioner filed his notice of intent to appeal.
5 On March 18, 1982, Clackamas County Board of Commissioners
6 heard petitioner's request for rehearing and granted the
7 request. On April 5, 1982, the Board of Commissioners reheard
8 petitioner's appeal. On April 30, 1982, the Board of
9 Commissioners entered Order No. 82-762 stating, in part:

10 "On rehearing of this matter, the Board hereby
11 reaffirms its previous decision affirming the decision
12 of the Hearings Officer for the reasons stated in BCC
13 Order No. 82-13."

14 Subsection C of Section 1304.09, set forth in Footnote 1,
15 supra, clearly provides with exceptions not pertinent here,
16 that if rehearing is granted the county is to rehear the matter
17 as though it were a new review. Section 1304.07 provides as
18 follows concerning review by the Board of Commissioners:

19 "BOARD OF COUNTY COMMISSIONERS ACTION: The Board of
20 County Commissioners may affirm, rescind or amend the
21 action of the Hearings Officer and may reasonably
22 grant approval subject to conditions necessary to
23 carry out the Comprehensive Plan and as a provided for
24 in subsection 1303.05. The Board of County
25 Commissioners may also remand the matter back to the
26 Hearings Officer for additional information.

"A. For all cases the Board of County Commissioners
shall make findings based on the record before it
and any testimony or other evidence received by
it and made a part of the record, as
justification for its action.

"B. The Board of County Commissioners shall state all
decisions upon the close of its hearing or upon

1 continuance of the matter to a time certain."

2 To comply with its own ordinance, then, once it grants a
3 request for rehearing the county must enter a new order
4 complete with findings. The county issued a new order on April
5 30, 1982. Petitioner has filed a notice of intent to appeal
6 with respect to the county's April 30, 1982, order. Whether
7 the county's decision of March 18, 1982, granting petitioner's
8 request for rehearing mooted the county's previous decision
9 which is involved in this appeal, or the county's written order
10 dated April 30, 1982, mooted the present appeal, is not
11 critical for purposes of our decision. Which ever is the case,
12 the present appeal is moot.

FOOTNOTES

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1 Section 1304.09 provides as follows:

"A. The Board of County Commissioners may rehear a matter before it either on its own motin or upon a petition for rehearing submitted within ten (10) days of its action by an aggreived party in the manner provided for by subsection 1304.04 for notices of review, provided, however, that no fee need accompy [sic] such petition.

"B. However, no petition or motion for a rehearing shall be granted unless a majority of the Board of County COMmissioners consents.

"C. If rehearing be granted, the application shall be heard as a new review except that all testimony and evidence theretofore received shall be included in the record.

"D. No action shall be reheard more than once.

"E. The Board of County Commissioners shall act upon the request within sixty (60) days of receipt thereof, unless such time limitation be extended with the consent of the parties. If no action is taken within sixty (60) days without such consent, the decision of the Hearings Officer is deemed final."

2 No issue has been raised as to whether a second request for rehearing was permitted under Clackamas County Zoning Ordinance, Section 1304.09.