

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from an order of the city council
4 rejecting an appeal from a decision of the city's
5 Development Review Board. The notice of appeal was
6 rejected on the grounds it had not been filed within the
7 time and in the manner prescribed by city ordinance.

8 FACTS

9 The Development Review Board approved a planned unit
10 development and subdivision under provisions of the city
11 zoning and development ordinances. The appeal time is
12 established in identical sections of the two ordinances:

13 "A decision of the hearing body shall be final, for
14 purposes of appeal, unless a written notice of appeal
15 from the applicant or aggrieved person is received by
16 the city recorder within 15 calendar days of the final
17 decision...." Sections 48.825, Lake Oswego Zoning
18 Ordinance and Section 49.625, Lake Oswego Development
19 Ordinance and Standards.

20 On the 15th day after the order of the Development Review
21 Board, one of the petitioners went to the city hall with the
22 notice of appeal and a check (for the filing fee) with the
23 intent of appealing the order. The regular business hours at
24 city hall end at 4:30 p.m. each day. The petitioner arrived at
25 4:45 p.m. and the city hall doors were closed. He met two
26 employees leaving the building, and they told him the city
27 recorder had left.¹ The petitioner gave them the notice of
28 appeal and check, and the city employees went back into the
29 city hall. The next morning the city recorder came into

1 possession of the notice of appeal and rejected it as untimely
2 filed. The matter then came before the city council which
3 entered the order affirming the rejection. This appeal is from
4 that order.

5 ASSIGNMENT OF ERROR

6 Petitioners' single assignment of error is that the city
7 misconstrued its own ordinances in rejecting petitioners'
8 appeal. In particular, petitioners object to the city's claim
9 a notice must be delivered during normal business hours to be
10 valid. Petitioners claim the ordinance merely requires
11 delivery within 15 days of the final decision.

12 Our review is aided by appellate court decisions regarding
13 filing deadlines with this Board. Where a notice of intent to
14 appeal was filed 11 minutes after LUBA's official closing time
15 on the last day to file an appeal, the Court of Appeals held
16 the filing was "within 20 days of transmittal of the record."
17 City of Hillsboro v. Housing Development Corp., 61 Or App 484
18 (1983). In Hillsboro the petitioners' representative, delayed
19 by a traffic jam, called LUBA and made arrangements for a staff
20 person to keep the office open until the representative could
21 arrive with the petition. The petition was then accepted 11
22 minutes past the official closing hour and stamped as filed at
23 that time. We understand that decision to hold a document
24 otherwise properly filed is to be considered filed on the day
25 it is accepted by the appropriate person or entity even if it
26 is accepted after official closing hours. That case can be

1 contrasted with Hoffman v. City of Portland, 294 Or 150, 654
2 P2d 1110 (1982) where filing the petition was attempted between
3 5:10 p.m. and 5:12 p.m. on the last day for filing. Because
4 the LUBA office was closed, the petition was left at the
5 doorstep. It was not stamped as received by LUBA until the
6 following morning. The petition was held not properly filed
7 within the time limits.²

8 In other cases, not involving land use appeals, the Supreme
9 Court has enunciated a strict standard about following
10 particular requirements of filing.

11 "This court has several times held that a paper cannot
12 be deemed to have been filed unless it is not only
13 delivered to the proper official, but also received by
14 him."

15 "In Bade v. Hibberd, 50 Or 501, 93 P. 364, the Court
16 said:

17 'A paper is filed in contemplation of law when it
18 is delivered to the proper officer with the
19 intention that it shall become a part of the
20 official record, and by him received to be kept
21 on file.'

22 "We do not believe that the act of the appellant's
23 counsel in laying the notice of appeal upon the desk
24 of a deputy county clerk during the absence of the
25 latter constituted filing of the paper." In re
26 Wagner's Estate, 192 Or 340, 342, 343, 187 P2d 669
(1977).

27 The Lake Oswego Ordinance does not refer to filing but
28 requires a notice of appeal to be received by the city
29 recorder. We find that receipt by the recorder is equivalent
30 to filing a paper. Thus, though Hillsboro would support the
31 conclusion that a notice of intent to appeal to the Lake Oswego

1 City Council may be filed after closing hours on the last day
2 for filing, it remains true that the notice must also be
3 received by the recorder.

4 In this case delivery of the notice of intent to appeal was
5 made neither to the recorder nor to any one in the recorder's
6 office with authority to act in the recorder's absence. More
7 is called for by the city's ordinances than delivery to any
8 employee of the city. We do not find the petition was received
9 by the recorder as required by the ordinances.

10 Petitioners advance another procedural argument based upon
11 a city code provision that states:

12 "The appeal of a hearing body decision to the council
13 shall be accomplished in accordance with the
14 provisions of this section. Failure by a person to
15 follow the procedures described in this section may
16 preclude that person from bringing an appeal before
17 the council." (emphasis supplied) Section 48.825,
18 Lake Oswego Zoning Ordinance and Section 49.625, Lake
19 Oswego Development Ordinance.

20 Petitioners believe the discretion given the city council by
21 that provision must be exercised in accordance with standards.
22 They claim that, in the absence of standards, the city may not
23 deny the right to appeal, citing Commonwealth Property v.
24 Washington Co., 35 Or App 387 (1978). That case involved a
25 county denial of a proposed subdivision plat. The denial was
26 based on several reasons, none of which reflected specific
standards set forth in the county plan or ordinances. The
denial was based instead on broad, general criteria in the
plan. The Court of Appeals clarified and reaffirmed its

1 holding and those of the Supreme Court that an applicant for a
2 permit should be able to know the standards by which his
3 application will be judged before going to the expense, time
4 and investment in legal fees necessary to make application,
5 citing Sunray Dairy v. OLCC, 16 Or App 63, 71, 517 P2d 289
6 (1973).

7 The rationale in those cases is inapplicable here. The
8 procedure for appealing an adverse decision of a hearings
9 officer or hearings body is employed after discretion is
10 exercised in granting or denying a permit. The reasons for
11 insisting on clear standards in permit decisionmaking (i.e., to
12 enable applicants to prepare the necessary proof or correct
13 deficiencies in their proposals) are not applicable with
14 respect to procedural matters of the type involved in this
15 case. We believe the city council was not obligated to spell
16 out the circumstances under which it would or would not excuse
17 procedural mistakes by appealing parties. The ordinance gave
18 the council discretion and we know of no constitutional,
19 statutory or other reason why that discretion could not be
20 freely exercised.

21 In support of our conclusion, we note that adoption of
22 specific standards concerning such procedural matters is not
23 required by statute. By contrast, standards governing permit
24 approvals are required.³ Adoption of some procedure for
25 review of permit decisions by the city council is required by
26 ORS 227.180. However, the portion of that statute concerning

1 time limits sets a minimum time of 7 days but does not set a
2 maximum time, nor does it require standards or criteria for
3 allowance of review.⁴

4 Without some requirement of statute, ordinance or other
5 applicable law or regulation that procedural standards or
6 criteria be adhered to in review of matters on appeal, the city
7 council is not prevented from exercising its function
8 differently than in matters where standards are specifically
9 required, at least where no constitutionally protected right is
10 infringed. See Anderson v. Peden, 284 Or 313, 587 P2d 59
11 (1978). For these reasons we do not agree the city was
12 required to establish standards regarding when and under what
13 conditions it may choose to waive the requirements of the
14 ordinance requiring appeals to be filed within 15 days.

15 Because the notice of intent to appeal was not delivered to
16 or received by the city recorder as set forth in the city
17 ordinance, the city was within its authority to reject the
18 appeal, and the assignment of error is denied.

19 The decision of the City of Lake Oswego is affirmed.

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FOOTNOTES

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The two employees worked in the finance department.

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The Court of Appeals affirmed LUBA's dismissal of the petition as not filed within the proper time. Hoffman v. City of Portland, 57 Or App 688 (1982). The Supreme Court reversed, not because LUBA did not have authority to dismiss the petition under such circumstances, but because LUBA thought it was required to do so under the appellate court decisions. The Supreme Court reversed Hoffman in order to give LUBA an opportunity to consider whether it would waive the time limits. LUBA declined to do so. Hoffman v. City of Portland, 7 Or LUBA 213 (1983).

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ORS 227.173 states:

"(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

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ORS 227.180 states in part:

"(1) (a) ...The procedure for such an appeal or review shall be prescribed by the council, but shall:

"(A) Not require that the appeal be filed within less than seven days after the date the governing body mails or delivers the decision of the hearings officer to the parties;...."