

LAND USE
BOARD OF APPEALS

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

JAN 4 1 05 PM '88

3	HERB RUSTRUM,)	
)	
4	Petitioner,)	LUBA No. 87-082
)	
5	vs.)	FINAL OPINION
)	AND ORDER
6	CLACKAMAS COUNTY,)	
)	
7	Respondent,)	
)	
8	and)	
)	
9	STAFFORD-TUALATIN VALLEY)	
	COMMUNITY PLANNING ORGANIZA-)	
10	TION,)	
)	
11	Participant-Respondent.))	

12 Appeal from Clackamas County.

13 Paul D. Schultz, Oregon City, filed the petition for review
14 and argued on behalf of petitioner. With him on the brief was
Hibbard, Caldwell, Bowerman & Schultz.

15 Michael E. Judd, Oregon City, filed a response brief and
16 argued on behalf of Respondent Clackamas County.

17 Joseph D. Cohen, Portland, filed a response brief and
18 argued on behalf of Participant-Respondent Stafford-Tualatin
Valley Community Planning Organization. With him on the brief
was Stoel, Rives, Boley, Jones & Grey.

19 HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee,
20 participated in the decision.

21 AFFIRMED 01/04/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the board of county
4 commissioners (county commissioners) denying his application
5 for approval of a short subdivision.¹

6 FACTS

7 Petitioner's request for approval of an eight lot short
8 subdivision was granted by the county planning director. The
9 planning director's approval was appealed to the county
10 commissioners within 10 days as required by ZDO 1305.02(E) (1).

11 The appeal of the planning director's approval was filed by
12 Niki Flanagan, president of the Stafford-Tualatin Valley
13 Community Planning Organization (STVCPO). No fee was paid at
14 the time the appeal of the planning director's decision was
15 filed.

16 At the hearing, the county commission rejected the
17 applicant's² argument that it lacked jurisdiction because no
18 fee accompanied the appeal of the planning director's
19 approval. The county commissioners reviewed the subdivision
20 application, determined it did not comply with certain
21 informational requirements, and on that basis denied the
22 application. The county commissioners' order expressly
23 provided the applicant could resubmit the subdivision
24 application without prejudice and without payment of an
25 additional fee.

26 We set forth additional facts and relevant county code

1 provisions below.

2 ASSIGNMENT OF ERROR

3 "The board of county commissioners erred in holding
4 that they had jurisdiction to hear the appeal."

5 Petitioner does not challenge the county's decision on the
6 merits. Petitioner's sole contention is the county
7 commissioners lacked jurisdiction to consider the appeal of the
8 planning director's approval. Petitioner argues payment of the
9 required appeal fee within the time required for the filing of
10 the appeal is jurisdictional under the following provisions of
11 the Clackamas County Zoning and Development Ordinance:

12 "1502.01 Fees payable at the time of application
13 shall be established by the board of county
14 commissioners, unless initiated by the
15 planning director, the planning commission,
16 or the board of county commissioners, for
17 which action there shall be no fee.

18 "1502.03 The failure to submit the required fee with
19 an application or notice of appeal,
20 including return of checks unpaid or other
21 failure of consideration, shall be a
22 jurisdictional defect."

23 Petitioner contends that under a fee schedule adopted by
24 order of the county commissioners, the applicable fee for the
25 appeal to the county commissioners was one half the application
26 fee. Petition for Review App 14. According to petitioner, his
application fee was \$510 and therefore an appeal fee of \$255
was due but not collected by the county. Petitioner argues
this failure was a jurisdictional defect.

Petitioner also argues that the county commissioners had no

1 authority to waive payment of the required appeal fee after the
2 ten day period for filing the appeal had run. Petitioner
3 states:

4 "The purported waiver of the fee by the Board of
5 County Commissioners occurred long after the ten (10)
6 day appeal period had expired. When the payment of
7 the fee is made a jurisdictional prerequisite to the
8 filing of a document, the filing of the document
9 without tender of the fee is a nullity. Assuming the
10 Board of County Commissioners has the authority to
11 waive the fee, their failure to grant the waiver prior
12 to the filing deadline made the appeal request
untimely. This was the holding of the court in Citron
v. Hazeltine, 227 Or 330, 361 P2d 1011 (1961). Citron
was subsequently overruled in U.S. National Bank v.
Lloyds, 239 Or 298, 382 P2d 851 (1963); however, the
court relied on a legislative change in the statute
expressly providing that payment of a filing fee was
not a jurisdictional defect in the latter case."
Petition for Review 6-7.

13 The county commissioners rejected petitioner's
14 jurisdictional challenge on alternative bases that (1) the
15 appeal was filed "on behalf of the Stafford-Tualatin Valley
16 CPO" and ZDO 1304.04(A) waives the appeal fee for CPOs; or (2)
17 it was appropriate to waive the appeal fee because "the appeal
18 request was accepted and processed by county staff without
19 demand for any fee." Record 1.

20 We first address the county commissioners' second basis for
21 rejecting the jurisdictional challenge.³

22 Under ZDO 1502.05:

23 "The Board of County Commissioners may reduce or waive
24 the fees [required to file a notice of appeal under
ZDO 1502.03] upon showing of just cause to do
25 so."⁴

26 In the order denying the subdivision application, the

1 commissioners waived the appeal fee concluding it was
2 appropriate to do so because "the appeal request was accepted
3 and processed by county staff without demand for any fee."⁵
4 Record 1. The county argues in its brief we should defer to
5 the county's interpretation of its own code that payment of the
6 filing fee is jurisdictional unless the county later waives or
7 reduces the fee for just cause.

8 Petitioner's reliance on Citron is misplaced. Citron
9 involved statutory requirements for payment of appeal fees to
10 the clerk of the circuit court at the time a notice of appeal
11 is filed.⁶ This proceeding deals with Clackamas County
12 Zoning and Development Ordinance provisions governing appeal of
13 a decision by the planning director. The relevant provisions
14 are ZDO 1502.03 and 1502.05 which provide as follows:

15 "1502.03 The failure to submit the required fee with
16 an application or notice of appeal,
17 including return of checks unpaid or other
18 failure of consideration, shall be a
19 jurisdictional defect.

18 "1502.05 The Board of County Commissioners may reduce
19 or waive the fee upon showing of just cause
20 to do so."

20 If we looked only at ZDO 1502.03 and ignored 1502.05,
21 petitioner's argument would be well taken. A county may, if it
22 chooses, make timely filing of fees for appeal a jurisdictional
23 requirement. ORS 215.422(1)(a); Beaverton v. Washington
24 County, 7 Or LUBA 121, 127 (1985). However, the existence of
25 ZDO 1502.05 is a critical difference between the appeal fee
26 provisions at issue in Citron and those at issue in this case.

1 In our view, the express provisions of ZDO 1502.05 for waiver
2 of the fee, which by its terms is not limited to any particular
3 time or stage of the appellate proceedings below, renders
4 Citron inapposite.

5 Petitioner attempts to avoid this obvious problem with
6 Citron by arguing the waiver must be granted prior to the
7 running of the appeal period. However, there is nothing in
8 Citron to support that argument. Indeed the statutes construed
9 by the Court in Citron had no analogous waiver provision and
10 had been interpreted previously to preclude waiver of the
11 required appeal fee. Therkelsen v. Therkelsen, 35 Or 75, 78,
12 54 P 885, 57 P 373 (1899). Unlike the statutes in Citron, the
13 Clackamas County Ordinance expressly provides for waiver of the
14 appeal fee. We find no basis in the language of ZDO 1502.05 to
15 impose an added restriction that an appeal fee waiver must
16 occur prior to the running of the appeal period.

17 We will defer to a county's interpretation of its own
18 enactment if that interpretation is reasonable. Alluis v.
19 Marion County, 64 Or App 478, 481, 668 P2d 1242 (1983).⁷
20 Absent clear language in ZDO 1502.05 limiting the time the
21 waiver may be granted, we believe the county's interpretation
22 of that provision to allow waiver of the required fee after the
23 appeal period has run is reasonable.⁸ We therefore deny
24 petitioner's assignment of error.

25 The decision of Clackamas County is affirmed.

FOOTNOTES

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Under the Clackamas County Zoning and Development Ordinance (ZDO), a short subdivision is defined as a division of property which does not qualify as a major or minor partition and which creates less than 11 lots in a single calendar year. ZDO 1105.01(b).

2

The petitioner in this proceeding was the applicant below.

3

Because we find the county properly applied ZDO 1502.05 to waive the required fee, it is unnecessary for us to address the alternative basis adopted by the county for concluding it had jurisdiction. It is also unnecessary for us to address the separate arguments made by Participant-Respondent STVCPO based on other county code provisions, constitutional requirements and statutes that participant-respondent argues are preemptive. Participant-respondent stated at oral argument that the issues it raised need not be addressed if the Board concluded the reasons asserted by the county for rejecting the jurisdictional challenge below were sufficient.

4

Petitioner does not argue there was not just cause to grant a waiver under ZDO 1502.05, only that the waiver came too late.

5

Petitioner argues there is no evidence in the record that no demand was made for the fee. Respondent correctly points out there is no requirement in ZDO 1502.05 that a waiver be preceded by a demand for the fee. Since demand for payment is not a precondition for waiver under ZDO 1502.05, the finding that there was no demand, even if incorrect, is at most surplussage. See Bonner v. City of Portland, 11 Or LUBA 40 (1984).

6

We previously had occasion to apply the cases cited by petitioner in a case where the filing fee and deposit for costs required by this Board under OAR 661-10-015(3) did not

1 accompany a notice of intent to appeal. Osborn v. Lane County,
2 4 Or LUBA 386 (1981). In that case the Board concluded late
3 payment of the filing fee and deposit for costs was not a
4 jurisdictional defect requiring dismissal. Id. at 371. The
5 Board noted that Citron had been overruled by U.S. National
Bank and concluded it would be "overly technical" to dismiss
the case without giving petitioners an opportunity to pay the
required fee. Id., citing Hilliard v. Lane County, 51 Or App
587, 626 P2d 905 (1980).

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8 Our deference to the county's interpretation of its own
9 ordinance is particularly appropriate in this case in view of
the Supreme Court's subsequent decision in U.S. National Bank
v. Lloyds, 239 Or 298, 382 P2d 851 (1964), overruling Citron.
In that case the Supreme Court first expressed concern with the
effect of Citron.

10 "Chapter 27, Oregon Laws 1963, now provides a
11 statutory declaration that the payment of the filing
12 fee is not jurisdictional. To that extent the
13 legislature has overturned the Citron decision.
14 However, we are equally concerned about other aspects
15 of the Citron decision. The obvious effect of the
16 Citron case upon other functions of the county clerks
17 leads us to believe that its overturn is inevitable.
18 As indicated, the legislative reversal does no more
than provide that the payment of a filing fee for the
filing of a notice of appeal is not jurisdictional.
It does not overrule the effect of the Citron case
that any document filed with the clerk for which the
filing is not paid is a nullity. A literal reading of
the Citron case can produce no other conclusion."
U.S. National Bank, supra at 300.

19 In U.S. National Bank the Court noted the current
20 requirement in ORS 21.110 that documents filed with the circuit
21 court shall not be deemed filed unless the required payment is
22 made, existed since 1895. The Court then noted that since
23 1895, county clerks are personally liable if documents are
24 filed without collecting the required fee. ORS 205.360. The
25 Court reasoned that in view of the ability to collect the fee
26 from the clerk if documents are improperly filed or recorded
without collection of the fee, it makes little sense to
continue to hold such filings are a nullity. Id. at 304-305.
The effect of the Court's decision in U.S. National Bank is to
extend to documents other than notices of appeal, the rule
adopted legislatively in ORS 19.035 for such notices of appeal
that while payment of the required fee may be jurisdictional,
the time of payment is not.

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In addition to the lack of support in the language of ZDO 1502.05 for petitioner's argument, we note petitioner has cited no purpose that would be furthered by the restrictive reading it argues. ZDO 1501 provides the "fees are for the purpose of defraying administrative costs." If the county determines that there is just cause to waive a fee designed to defray administrative costs, no relevant purpose would be furthered by limiting the time in which the waiver could be granted.