

MAY 2 4 29 PM '88

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

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2
3 MCKAY CREEK VALLEY ASSOCIATION,)
DENNIS and CONNIE SHATTO,)
4 RICHARD and JOYCE STRIDE, DON)
and ELAINE LOGAN, and FRED and)
5 CHRISTINE KING,)
6 Petitioners,)
7 vs.)
8 WASHINGTON COUNTY,)
9 Respondent,)
10 and)
11 ALFRED NORDGREN,)
12 Intervenor-Respondent.)

LUBA No. 88-002
FINAL OPINION
AND ORDER OF DISMISSAL

13
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21 Attorney for
Intervenor-Respondent

22 BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee.

23 DISMISSED 05/02/88

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

1 Bagg, Chief Referee.

2 Intervenor Alfred Nordgren requests this Board dismiss the
3 above-entitled review proceeding on the ground the decision
4 "was a nullity in that the County Board was without
5 jurisdiction to act." Motion to Dismiss at 2.

6 Intervenor explains that in April, 1987, a Washington
7 County hearings officer issued a decision approving the
8 intervenor's application for a minor land partition to create
9 nonfarm parcels eligible for nonfarm dwellings. A notice was
10 mailed to petitioners indicating that the hearings officer's
11 decision could be appealed to the county board until May 15,
12 1987. On that date, petitioner McKay Creek Valley Association
13 filed a petition for review along with the fee of \$265. On May
14 26, 1987 the association was notified that an additional \$200
15 was required, representing an estimate of the cost of preparing
16 a transcript. Under the Washington County Community
17 Development Code (CDC), a transcript is required for all
18 appeals within Washington County. This amount was paid. The
19 letter further advised the association that the balance of the
20 actual cost of preparing the transcript would be billed to the
21 association upon completion, and that failure to make the
22 required payment would constitute a "jurisdictional defect."
23 Record 209.

24 On July 1, 1987, the association was advised that an
25 additional \$5 was required to pay for the completed
26 transcript. The letter stated that failure to pay the balance

1 by July 8, 1987, would result in a "jurisdictional defect."

2 Record 288. Payment was not made until July 13, 1987.

3 Notwithstanding this late tender, the county accepted
4 payment. Further, the board of county commissioners at its
5 meeting of August 25, 1987, considered this issue and decided
6 to hear the association's appeal. The county sustained the
7 decision of the hearings officer and approved the intervenor's
8 application.

9 CDC Section 209-4.2 provides as follows:

10 In all cases where a transcript is required, the
11 Director shall promptly provide the appellant with a
12 written estimate of the cost. Failure to pay the
13 estimated cost within fourteen (14) calendar days of
14 being provided the estimate shall be a jurisdictional
15 defect. Failure to pay the total balance due in
16 excess of the estimate within seven (7) calendar days
17 of billing shall be a jurisdictional defect. Any
18 amount paid in excess of the actual costs shall be
19 refunded by the Director within thirty (30) calendar
20 days of determination of the actual cost."

21 Intervenor argues the county board erred in considering the
22 appeal. Intervenor argues the county board was without power
23 to hear the case because CDC Section 209-4.2 states a
24 "jurisdictional defect" exists if the proper fees are not
25 tendered within the time provided. Intervenor argues that
26 there is no express grant of authority in the CDC allowing the
27 county board to waive any payments or performances required
28 under CDC Section 209-4.2.

29 Petitioners detail what we understand to be a series of
30 extenuating circumstances which explain the reason for the
31 delay in paying the \$5 transcript balance. Petitioners cite

1 difficulties in communicating with the county on the question
2 of when money was due as well as the fact that the bill dated
3 July 1, 1987 was not postmarked until July 2, 1987.¹

4 We do not believe the circumstances suggesting possible
5 misunderstanding between petitioners and the county are
6 controlling. Rather, what is controlling is the terms of the
7 county ordinance clearly providing that failure to pay fees'
8 within the time provided in Section 209-4 is a "jurisdictional
9 defect."

10 In Beaverton v. Washington County, 7 Or LUBA 121 (1983), we
11 construed a substantially similar CDC provision in an appeal of
12 a county order refusing an appeal because the required steps
13 were not followed. As in the present proceeding, the
14 transcript fee was paid late. In that case we sustained the
15 county's refusal to consider the appeal and accepted the
16 county's argument that the provision gave the county no
17 discretion to hold an appeal without timely payment of required
18 fees. We said

19 "'Jurisdiction' is exercised pursuant to legal
20 authority, and the county certainly has legal
21 authority to conduct reviews of planning commission
22 land use decisions. What emerges from the county
23 ordinance is an intent to hold any petitioner to time
24 limits for payment of fees and charges. The county
25 ordinance makes it clear the county does not intend to
26 entertain appeals which have not been filed and fully
paid for within the times prescribed. We know of no
prohibition against a county establishing such strict
requirements; indeed, the matter of procedure for the
conduct of appeals within the county is a matter for
the county." ORS 215.422(1)(a). Id. at 127.

As we recently made clear, a county is not required to

1 adopt such a strict requirement for "timely" payment of appeals
2 fees. Rustrum v. Clackamas County, ___ Or LUBA ___ (LUBA No.
3 87-092, January 4, 1988). However, having adopted language in
4 its code providing that timely payment is jurisdictional, the
5 county is bound to interpret the CDC to impose a jurisdictional
6 requirement. If the county no longer wishes to impose such a
7 rigid requirement, we are aware of nothing to prevent amendment
8 of the CDC to provide flexibility.

9 Whether or not prompt payment of all fees and other charges
10 is characterized correctly as a "jurisdictional" requirement in
11 the Washington County Ordinance, is not important. The county
12 adopted an ordinance which limits its authority to extend
13 deadlines or accept untimely filings and payments. Through its
14 use of the word "jurisdictional," the county has announced to
15 the world that it will not consider appeals presented in a
16 fashion other than as strictly provided for in the code. See
17 Hoffman v. City of Portland, 294 Or 150, 154-155, 650(4) P2d
18 1106 (1982).

19 One troubling aspect of this case remains. The county did
20 indeed accept the \$5, albeit late, and it may be argued that
21 that acceptance constitutes a waiver of the requirement for
22 timely payment of the fee. However, in Beaverton, supra, the
23 county also accepted the late tender of the transcript fee. In
24 contrast, in Rustrum v. Clackamas County, the county ordinance
25 contained a specific provision allowing the county to waive its
26 fee requirements while the ordinance otherwise provided fees

1 were jurisdictional. The Washington County ordinance clearly
2 evidences a legislative intent to prohibit consideration of
3 appeals where the "jurisdictional" requisites are not
4 satisfied. It contains no provisions authorizing waiver of
5 such "jurisdictional" requirements.

6 The county left itself with no choice in this matter.
7 Without an ordinance provision authorizing a waiver, timely
8 payment of the transcript fee could not be waived by improperly
9 accepting the late fee. A "jurisdictional" requirement may not
10 be waived by stipulation of the parties, City of Hermiston v.
11 Employment Relations Board, 280 Or 291, 570 P2d 663 (1977).

12 The county lacked authority under the current CDC to accept
13 the late payment of the transcript fee.

14 Intervenor's motion to dismiss is sustained.

15 This case is dismissed.

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1 FOOTNOTES

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3 1 Petitioners recite the following series of events in which
4 Ms. Hardwick, acting for petitioner McKay Creek Valley
5 Association, engaged in several contracts with Ms. Angevine and
6 Mr. Schlecht, county staff persons, on the transcript fee issue:

7 "Ms. Hardwick opened the letter on July 9, 1987, upon her
8 return from a Fourth of July holiday. (Transcript 2) She
9 called Ms. Angevine the same day and described the contents
10 of the letter to her. Id. Ms. Angevine told her that the
11 money had been due by 5:00 p.m. on July 8, and was hence a
12 day too late. Id. Ms. Angevine stated she could not make
13 a decision to accept the additional funds. Id. Ms.
14 Hardwick asked who else she could talk to about this and
15 was told she could talk to Bill 'Schlack' (actually,
16 'Schlecht'), but that this probably wouldn't do any good.
17 Id.

18 "Ms. Hardwick testified that the trip to the Washington
19 County Courthouse is a 25 mile round trip for her, and
20 Ms. Angevine had made it 'really clear to me that she
21 didn't think there was any reason to even bother, that it
22 was a day late.' (Transcript 3) Ms. Hardwick described
23 the postmark date on the envelope to either Ms. Angevine or
24 Mr. Schlecht's secretary. Id.

25 "Ms. Hardwick immediately called Mr. Schlecht's office, but
26 he was not in; she left a message for him. Id. She called
again on July 10, was told Mr. Schlecht was not in, and
left another message for him. Id. Ms. Hardwick was asked
whether a record would be left to indicate that she had
been trying to clear up 'the matter,' and she was told that
the phone messages left for Mr. Schlecht would have this
effect. Id. Mr. Schlecht never returned Ms. Hardwick's
calls. Id. (Interestingly, in a memorandum to county
counsel dated July 9, Mr. Schlecht, who is the county's
Land Development Manager, stated that Petitioners' seven
days were already up and 'this appeal is now invalid.'
(Rec.287))

27 "After this point, Petitioner Dennis Shatto took over the
28 matter and consulted with an attorney about the correct
29 billing date for the excess transcript fee. The following
30 Monday, on July 13, 1987, Mr. Shatto paid the \$5 in
31 question to Washington County and the funds were in fact
32 accepted. (Transcript 6)" Petitioners' Answer to
33 Intervenor's Motion to Dismiss 4-5.

1 We do not find these circumstances establish that the
2 association was misled as to the responsibility to pay the fee
3 and the consequences of failure to do so. Even if we were to
4 find the doctrine of estoppel extant here, as petitioners urge,
5 we do not find these facts show sufficient inducement by county
6 staff to lead the association to believe prompt payment of the
7 required fee was somehow not critical to the life of its
8 appeal. In particular, the county made no false representations
9 about the payments and the petitioner was not ignorant of the
10 need to pay the fee on time. See Earls et ux v. Clarke, 223 Or
11 527, 355 P2d 213 (1960); Clackamas County v. Emmert, 14 Or App
12 493, 499-500, 513 P2d 532 (1973).

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1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion
3 and Order of Dismissal for LUBA No. 88-002, on May 2, 1988, by
4 mailing to said parties or their attorney a true copy thereof
5 contained in a sealed envelope with postage prepaid addressed
6 to said parties or their attorney as follows:

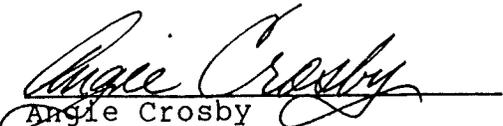
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25 Dated this 2nd day of May, 1988.

26

Angie Crosby
Administrative Assistant