

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

3	HAROLD F. MEYER,	)	
4	Petitioner,	)	LUBA NO. 80-146
5	vs.	)	ORDER ON MOTION
6	WASHINGTON COUNTY, OREGON,	)	TO DISMISS
7	Respondent,	)	
8	vs.	)	
9	LLOYD G. DUYCK,	)	
10	Intervenor.	)	

11       This matter is before the Board on motion of Lloyd G. Duyck  
12 to dismiss the appeal for the reasons that

13           (1) Petitioner failed to file his Notice of  
14           Intent of Appeal within the time allowed; and

15           (2) Petitioner does not have standing to bring  
16           the appeal.

17       Conference calls were held on December 3, 1980 and January  
18 7, 1980, at which time the issues were discussed. At the  
19 conference call Mr. Duyck was represented by Thomas J. Moore,  
20 Petitioner Harold F. Meyer was represented by DeMar L.  
21 Batchelor, and Washington County was represented by Yvonne M.  
22 Sherlock, Assistant County Counsel.

23       The first ground for dismissal is based upon a portion of  
24 the Washington County Development Ordinance providing that a  
25 land use action may be "reheard" only once. Washington County  
26 Development Ordinance, Article 2, Section 2201-4.9(d).

26 Respondent claims the facts in the case show two such

1 "rehearings" in contravention of the ordinance. Considering  
2 only the first "rehearing" as proper under the ordinance, the  
3 time for filing the notice of intent to appeal passed long  
4 before the Board received a notice of intent to appeal.

5 The ordinance provides a multi-step county review process.  
6 The first step is an appeal of the decision of a hearings  
7 officer. His decision is final unless "a notice of review" is  
8 given to the Planning Director within ten days of the hearings  
9 officer's decision or unless the County Commission decides on  
10 its own to review the matter within 15 days of the hearings  
11 officer's decision. Section 22.01-4.1. If an appeal is taken,  
12 notice of the review is given, and the notice must be the same  
13 as that required for initial hearings on proposed land use  
14 actions. Section 22.01-4.4 provides specific matters of  
15 information that must be included in the notice of review. The  
16 hearing is conducted on the record unless a special provision  
17 is invoked allowing the County Commission to take additional  
18 testimony. That review proceeding concludes with an order that  
19 may affirm, reverse or amend the hearings officer's decision,  
20 and the County Commission is to make appropriate findings and  
21 conclusions to support its decision. Section 22.01-4.8. There  
22 then follows a space of time "until the first succeeding  
23 business day following the next regular Board meeting" when the  
24 action is final.<sup>1</sup>

25 The process does not end there, however. The County  
26 Commission may rehear its action either on its own motion or

1 upon a petition for rehearing. The County Commission is  
2 obliged to summarily decide whether the petition for rehearing  
3 should be granted and the action heard again, or whether the  
4 rehearing shall be denied and the matter considered ended.  
5 Section 22.01-4.9. In this case, the hearings officer made his  
6 decision on the application involved in this appeal on January  
7 3, 1980. The vehicle for review of the hearings officer's  
8 decision was by a "petition for review" made on January 14,  
9 1980. Record 182. Apparently pursuant to that petition, a  
10 hearing was scheduled for April 8. That April 8 hearing  
11 resulted in an order of May 1 granting a lot of exception for  
12 the applicant. Even before being reduced to writing,  
13 Petitioner Harold Meyer moved the county on April 15, 1980, for  
14 a "rehearing" of its action. The point of the petition for  
15 rehearing was an allegation that the county had failed to give  
16 notice of the time and place of the hearing to the petitioner  
17 below, Harold Meyer. The petitioner characterized the defect  
18 as "jurisdictional." At the hearing on July 8, 1980, the  
19 County Commission granted this petition for rehearing  
20 apparently because it found that proper notice had not been  
21 given. The "rehearing" granted was then scheduled for August  
22 19.<sup>2</sup>

23 At the August 19 hearing, the Commissiond approved the lot  
24 of exception for Mr. Duyck. The commissioners entered an order  
25 stating it was "reaffirming the Board's previous action of  
26 approval" to the lot of exception requested. That order was

1 entered on September 10, and a petition for "reconsideration"  
2 was filed by Harold Meyer on September 11. This time, the  
3 reconsideration was based on substantive requirements in the  
4 ordinance.

5 On September 23, 1980, the commissioners denied the request  
6 for reconsideration (apparently in a letter by the zoning  
7 administrator), and a notice of intent to appeal was filed with  
8 the Land Use Board of Appeals on October 21, 1980.

9 Respondent argues that the titles to the various petitions  
10 filed with the county in an attempt to overturn the grant of  
11 the lot of exception for Mr. Duyck are of no consequence. The  
12 fact that the petitions may have been called petitions for  
13 reconsideration should not be depositive of the case, and this  
14 Board is asked to look to the ordinance itself to see whether  
15 or not a second "petition for rehearing" has been impermissibly  
16 filed. Under petitioner's view, the hearing of April 8 was a  
17 nullity because of the lack of adequate notice. The hearing of  
18 August 19 would be the first hearing considering the decision  
19 of the hearings officer, and the hearing of September 23  
20 (occasioned by the petition of September 11) would be the first  
21 request for "reconsideration within Section 22.01-4.9(d) of the  
22 ordinance.

23 We agree with petitioner. The first request by Mr. Meyer  
24 to overturn the action of the hearings officer was called a  
25 petition for review, not a petition for rehearing. As the  
26 hearing held pursuant to that request for review was found by

1 the county to be procedurally defective, the next petition for  
2 "reconsideration" resulting in the hearing on the merits would,  
3 in essence, be a first "review" of the hearings officer's  
4 decision. Losing the case at that level, the petitioner then  
5 filed a single petition for reconsideration under Section  
6 22.01-4.9(d) on September 11. The act of the county being  
7 appealed occurred, then, on September 23; and petitioner's  
8 notice of intent to appeal to this Board was timely filed on  
9 October 21.

10 We are not concerned that Petitioner Meyer occasioned a  
11 review of the document called a "petition for rehearing" going  
12 only to the matter of notice. Though neither party has seen  
13 fit to provide this Board with any citations, it is a well  
14 accepted proposition that a failure to give adequate notice in  
15 a proceeding of this kind is a fatal defect. 3 Anderson,  
16 Amercial Law of Zoning, 2nd Edition, sec 20.17 et sec (1977).  
17 This Board does not believe that petitioner lost any appeal  
18 rights or "used up" one of his petitions for reconsideration by  
19 asking for a new hearing on the merits where the old hearing on  
20 the merits was procedurally defective.

21 There is another possible reason for dismissal of this case  
22 we asked the parties to address at the last conference call.  
23 In MSD v. Washington County, LUBA 80-034, a motion to dismiss  
24 was made on the ground that the petitioner had failed to  
25 exhaust his administrative remedies before the county in that  
26 he had not taken advantage of these same rehearing provisions

1 in the Washington County ordinance. We denied the motion to  
2 dismiss because we found the stated requirement for a rehearing  
3 before the county to be ineffective to deny the Land Use Board  
4 of Appeals' jurisdiction to hear a case after a final decision  
5 had been reached on the merits by the county. We found the  
6 grant of a rehearing to be entirely discretionary with the  
7 county: and, as such, failure to exercise the rehearing option  
8 would not divest this Board of jurisdiction to hear an  
9 otherwise perfected appeal.

10 Our inquiry, relative to the case, was whether by  
11 exercising the rehearing provision, a petitioner might exceed  
12 the 30 day time limit to bring an appeal provided in Oregon  
13 Laws 1979, ch 772, sec 4(4). That is, in order to protect his  
14 appeal rights, should an appellant file not only a request for  
15 rehearing before the county, but also an appeal with the Land  
16 Use Board within 30 days of the date of the county's decision?

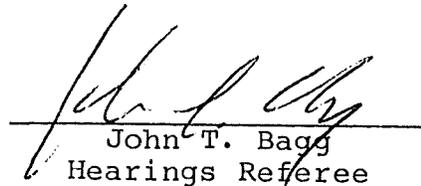
17 It is our view that a petitioner exercising an optional  
18 rehearing provision at a local level does not thereby forego  
19 his appeal to us. If appeals are provided for at a local  
20 level, and if the local jurisdiction is required to act on such  
21 a local appeal by affirming the decision, reversing the  
22 decision or even denying a new hearing on the decision, we  
23 believe that suspends the time for the filing of an appeal to  
24 us until the county has acted pursuant to its own internal  
25 appeals procedures. To say otherwise would be discouraging an  
26 individual from exercising all of his options on a local level

1 before seeking review by this Board. We believe that effect  
2 would be contrary to the purpose we believe exists in Oregon  
3 Laws 1979, ch 772 and in the general philosophy in Oregon that  
4 land use planning is a local matter subject to state guidance.  
5 See ORS 197.005, 197.010.

6 The second ground for dismissal made in the motion is that  
7 petitioner does not have standing to bring the case. As  
8 discussed with the parties at the conference call, it is the  
9 petition for review that sets out facts showing petitioner's  
10 standing. Intervenor Duyck's objection to standing will be  
11 preserved until such time as the petition has been filed. The  
12 Board suggests for the convenience of the parties that the  
13 matter of standing be briefed and discussed at the hearing of  
14 the merits.

15 The motion for dismissal is denied.

16 Dated this 22nd day of January, 1981.

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18   
19 John T. Bagg  
Hearings Referee

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FOOTNOTE

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The Washington County Board of Commissioners refers to itself as the "Board."

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It is asserted by Intervenor and Duyck that Mr. Meyer is not a "party" because he is not one of the individuals entitled under Section 22.01-2.2 to notice of the proceeding. However, Mr. Meyer did appear before the hearings officer and requested to become a party. Under Section 22.01-3.10, a person who appears and demonstrates to the hearings officer that his rights are affected by the outcome of the proceeding is entitled to be treated from that point forward as a party. The hearings officer apparently treated Mr. Meyer as a party and afforded him that status under Section 22.01-3.10(c). The Board believes that it does not have the power to tamper with this finding by the hearings officer.