

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

SPALDING & SON, INC.,)
Petitioner,) LUBA No. 85-028
vs.)
JOSEPHINE COUNTY,) ORDER DENYING
Respondent.) MOTION TO DISMISS

This matter is before the Board on motion of Respondent Byers Construction, Inc. Respondent asks us to dismiss this appeal on the ground we lack jurisdiction.¹ Respondent argues petitioner did not apply for a rehearing and therefore failed to exhaust remedies available to it under the Josephine County Zoning Ordinance. Respondent cites ORS 197.825(2)(a), providing that our jurisdiction

"is limited to those cases which petitioner has exhausted all remedies available by right before petitioning the Board for review...." See also, OAR 661-10-010(3), 015(1).

We deny the motion. Although our jurisdiction depends upon exhaustion of all the local remedies available by right, ORS 197.825(2)(a), the facts do not show there was any local remedy "available by right" to petitioners.

The provision controlling rehearing provides that once a matter has been heard by the board of commissioners, "the matter may be reheard before it either on its own motion or upon a petition for a rehearing by an aggrieved party."

1 (Emphasis added). Josephine County Land Use Hearing Rules,
2 Section 17. There is no requirement that the board of county
3 commissioners act upon a petition for rehearing. Only if the
4 board chooses to hear the petition, must it proceed to hear the
5 matter "within ten (10) days from the date of the decision to
6 allow the rehearing...." Ibid, Section 17(d).

7 This rehearing provision is unlike the one under review in
8 Yoder v. City of West Linn, ___ Or LUBA ___, (LUBA No. 84-103,
9 Slip Opinion dated 2/1/85). In Yoder, we held a petitioner had
10 failed to exhaust administrative remedies where the local
11 ordinance provided a request for rehearing must be granted or
12 denied by the governing body. Here, in contrast, the
13 permissive language of Section 17 of the Josephine County Rules
14 allows the governing body to ignore a petition for rehearing
15 for an indefinite period. Therefore, while rehearing may be
16 available in Josephine County, it is not a remedy "available by
17 right."

18 There is an additional reason for us to deny the motion.
19 As we understand the Josephine County Zoning Ordinance, an
20 amendment to the ordinance, including a zone change, is an
21 action which may be taken only by the county board of
22 commissioners. The planning commission's role is limited to
23 making a "report" to the county board, and the planning
24 commission has no power to enact an amendment.² Josephine
25 County Zoning Ordinance, Section 51.054. The planning
26 commission does issue final decisions on other matters such as

1 variances.³ See Josephine County Ordinance, Section 52.030.

2 See also Section 14, Josephine County Land Use Hearing Rules in
3 which the planning commission is given authority to

4 "approve the application as submitted, deny the
5 application, approve the application with such
6 conditions as it deems appropriate, table the
7 proposal, or continue the application for further
8 study or deliberation to a date and time certain."⁴

9 The rehearing provision found in Section 17 of the rules
10 limits a rehearing to circumstances where the county
11 commissioners hold a hearing upon a petition for review.⁵

12 Under the county's rules, a petition for review is
13 available on any "final action of the planning or zoning
14 commission."⁶ Josephine County Land Use Hearing Rules,
15 Section 16(1). While the ordinance does not contain a clear
16 definition of what a "final action" is, a plausible reading of
17 the ordinance is that a planning commission's final action is
18 one which may stand on its own and does not require further
19 action by the county board of commissioners or some other
20 body. Availability of a rehearing before the county
21 commissioners is therefore apparently limited to those
22 decisions which (1) were first issued by the planning
23 commission as final decisions, not just reports and, (2) were
24 then appealed to the county board. Where the planning
25 commission has not issued a final decision, but only a
26 recommendation, there is no authority for a petition for
review. Consequently, no rehearing is available after the

1 county board takes action in such cases.

2 The motion to dismiss is denied.

3 Dated this 25th day of July, 1985.

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John T. Bagg
Chief Referee

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FOOTNOTES

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4 Two decisions affecting the applicant's property were
5 before the Josephine County Board of Commissioners. Only one
6 has been appealed to us. One was a planned unit development
7 request denied by the planning commission and approved, on
8 appeal, by the board of commissioners. The second is the zone
9 change on review here. The zone change was necessary to the
10 planned unit development project.

11 Respondent seems to characterize the planning commission
12 recommendation on the zone change as part of the appeal of the
13 planned unit development. The planned unit development request
14 was denied by the planning commission at the same time it
15 considered a recommendation on the zone change. However, the
16 notice of appeal (or "petition of appeal") of the planned unit
17 development decision appears at page 73 of the record and it
18 makes no mention of any zone change decision. The fact the
19 planned unit development decision and the zone change record
20 were made at the same time does not mean they are legally
21 inseparable.

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23 There are no provisions for rehearing in the Josephine
24 County Zoning Ordinance. The parties have not argued whether
25 the rules are an effective supplement to the zoning ordinance.
26 Because the zoning ordinance provides nothing on the manner of
a rehearing, it might be argued that while the rules are
effective to control procedure, they are not effective to enact
a whole new and separate post appeals procedure not provided
for in the zoning ordinance. For the purpose of our review
here, we will not speculate on this possible issue.

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28 By "final" we mean a decision which requires no further
29 action to become effective.

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31 Appeals of planning commission decisions, which would
32 otherwise be final absent an appeal to the board of
33 commissioners, require the filing of an appeal within a
34 particular length of time. See Josephine County Zoning
35 Ordinance, Section 52.040 and 52.042.

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2 Section 17 of the rules provides, in part, as follows:

3 "Once a matter has been heard by the Board of County
4 Commissioners upon a Petition for Review as provided
5 herein, the matter may be reheard before it either on
6 its own motion or upon a Petition for Rehearing by an
7 aggrieved party. A Petition for Rehearing by an
8 aggrieved party shall comply with the following:

9 "a. The Petition for Rehearing shall be submitted
10 within five (5) days from the date of the public
11 hearing at which the oral decision on the matter
12 was rendered. Said five (5) day period shall
13 include weekends and holidays." (Footnote added).

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The rules call the notice a "petition for review." The document in the record appealing the planning commission decision on the planned unit development is entitled "petition on appeal."