

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

3
4 ARNOLD ROCHLIN,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 MULTNOMAH COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 DAN MCKENZIE, CONRAD MILLER,)
17 CINDA ING, ANGELA MILLER, and)
18 ELAINE MEDOFF,)
19)
20 Intervenors-Respondent.)

LUBA No. 93-019

FINAL OPINION
AND ORDER

21
22
23 Appeal from Multnomah County.

24
25 Arnold Rochlin, Portland, filed the petition for review
26 and argued on his own behalf.

27
28 John L. DuBay, Chief Assistant County Counsel,
29 Portland, filed a response brief and argued on behalf of
30 respondent.

31
32 Dan McKenzie, Portland, filed a response brief and
33 argued on his own behalf.

34
35 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
36 Referee, participated in the decision.

37
38 REVERSED 07/22/93

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision determining that a
4 Significant Environmental Concern (SEC) permit is not
5 required, and modifying a previously approved hillside
6 development (HD) permit, for a stream crossing.

7 **MOTIONS TO INTERVENE**

8 Dan McKenzie, Conrad Miller, Cinda Ing, Angela Miller,
9 and Elaine Medoff move to intervene on the side of
10 respondent in this appeal. There is no objection to the
11 motions, and they are allowed.

12 **FACTS**

13 The subject property consists of three acres and is
14 zoned Multiple Use Forest (MUF-19). A stream crosses the
15 subject property, and the portion of the subject property
16 where a stream crossing was constructed is within a
17 Significant Environmental Concern (SEC) overlay zone.

18 In 1991, the applicant obtained three permits covering
19 the subject property -- (1) a conditional use permit for a
20 dwelling, (2) a HD permit to allow the construction of a
21 bridge and driveway on slopes in excess of 20%, and (3) a
22 SEC permit to construct a bridge to provide access to the
23 dwelling. However, the applicant did not construct a bridge
24 crossing. Rather, the applicant constructed a culvert and
25 fill crossing over the stream. Thereafter, the applicant
26 requested permission to modify the HD and SEC permits, to

1 allow the culvert and fill crossing. The planning
2 department approved the request, and petitioner appealed to
3 the hearings officer. The hearings officer reversed the
4 decision of the planning department and denied the request.
5 The applicant appealed the hearings officer's decision to
6 the board of commissioners.

7 Before the board of commissioners, a motion was made to
8 approve the request. However, that motion failed due to a
9 tie vote (denial). The board of commissioners conducted a
10 rehearing on the matter and, on rehearing, determined that a
11 SEC permit is not required, and approved the request for a
12 modification of the HD permit to allow the culvert and fill
13 crossing. This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 The board of commissioners' denial decision was filed
16 with the board of commissioners' clerk on October 15, 1992.
17 Record 109. The board of commissioners made its decision to
18 conduct a rehearing on the matter on October 27, 1992.

19 Petitioner argues the board of commissioners had only
20 ten days to decide to rehear the matter under Multnomah
21 County Code (MCC) 11.15.8280(D). According to petitioner,
22 the board of commissioners' failure to decide to rehear the
23 matter within the ten day period provided by
24 MCC 11.15.8280(D) means that the board of commissioners was
25 precluded from rehearing the application. Petitioner
26 maintains the county lacked authority to conduct the

1 rehearing proceedings, and that the decision resulting from
2 the rehearing is a nullity.

3 MCC 11.15.8280(D) provides:

4 "The [board of commissioners'] decision shall be
5 final at the close of business on the tenth day
6 after the Decision, Findings of Fact and
7 Conclusions have been filed under [MCC
8 11.15.8280(C)]^[1], unless the [board of
9 commissioners] on its own motion grants a
10 rehearing under [MCC 11.15.8285]." (Emphasis
11 supplied.)

12 MCC 11.15.8285 provides:

13 "The [board of commissioners] may rehear a matter
14 on its own motion under subsection (A).

15 "(A) A [board of commissioners] motion for
16 rehearing shall be made, if at all, within
17 ten days after the Decision, Findings of Fact
18 and Conclusions have been signed and filed
19 with the Clerk of the [board of
20 commissioners] under [MCC 11.15.8280(C)].

21 "(B) A [board of commissioners] motion for
22 rehearing shall be made, if at all, within
23 ten days after the action takes effect as
24 provided in [MCC 11.15.8280(C)].

25 "* * * * *"

26 The challenged decision contains no interpretation of
27 the above quoted MCC provisions. However, there is no
28 dispute that the rationale for the board of commissioners'

¹MCC 11.15.8280(C) provides:

"Written findings of fact and conclusions, based upon the record, shall be signed by the Presiding Officer of the [board of commissioners] and filed with the Clerk of the [board of commissioners] with a decision within five business days following announcement of the decision * * *."

1 decision to allow a rehearing is embodied within the
2 following statement of an assistant county counsel, in the
3 transcribed statements attached to the petition for review.
4 That interpretation is as follows:

5 "[The MCC] provides that a motion for rehearing
6 should be made within ten days after a decision
7 becomes final. A decision must be filed within
8 five days after its made [by the board of
9 commissioners]. The decision was filed on a
10 Thursday afternoon. It was impossible under [the
11 board of commissioners'] rules to put [the matter]
12 on the agenda before today. This is the twelfth
13 day after [the decision was filed]. [We're]
14 actually one day beyond the ten day period and
15 that * * * raises a procedural problem that * * *
16 may or may not be insurmountable. * * *"
17 Petition for Review A-2.

18 As we understand it, the county's position is that it was
19 not required to decide to rehear an application until it had
20 an opportunity, in its regular schedule, to consider the
21 matter and that it would have been "impossible" to make a
22 decision to rehear any earlier.

23 We have three problems with this interpretation.
24 First, the board of commissioners' own rules state, in Rules
25 Section 4(A):

26 "(1) The [board of commissioners] shall meet on
27 the fourth Tuesday of each month or other
28 days as necessary for the purpose of deciding
29 or deliberating on land use planning items.

30 "* * * * *

31 (3) The [board of commissioners] may schedule
32 meetings on other days as deemed appropriate.

33 "* * * * *" (Emphasis supplied.)

1 Clearly, it is not legally impossible for the board of
2 commissioners to conduct a special meeting to consider
3 whether to rehear a land use development application.

4 Second, arguments similar to those the county makes
5 here were rejected by the court of appeals in Century 21
6 Properties, Inc. v. City of Tigard, 99 Or App 435, 437-39,
7 783 P2d 13 (1989) (Century 21). In Century 21, the court of
8 appeals held that where a local governing body fails to
9 initiate an appeal of a hearings officer's decision within
10 the appeal period provided in the local code, the governing
11 body has no authority to conduct the appeal proceeding.
12 Specifically, the court determined that in the absence of
13 contrary provisions in the local code the governing body was
14 bound by the time limitations expressed in the code. The
15 court in Century 21 refused to recognize an exception to
16 accommodate practical problems associated with gathering a
17 governing body together to make a decision within a
18 particular period of time. Century 21, supra, 99 Or App
19 at 439 n 2.

20 Third, there is only one reasonable interpretation of
21 the above quoted MCC provisions. MCC 11.15.8280(D) provides
22 that a decision of the board of commissioners becomes final
23 ten days after the date it is filed with the clerk of the
24 board, unless a decision to grant a rehearing under MCC
25 11.15.8285 is made. MCC 11.15.8285(A) and (B) overlap.
26 Both provisions state that if the board of commissioners

1 wishes to rehear a matter, it must decide to do so within
2 ten days of the date a board of commissioners' decision is
3 filed with the clerk of the board. There is no reasonable
4 interpretation of MCC 11.15.8285(A) and (B) other than the
5 board of commissioners must decide to rehear a matter within
6 ten days of the original decision having been filed with the
7 board clerk. See Goose Hollow Foothills League v. City of
8 Portland, 117 Or App 238, 243, 843 P2d 992 (1990).

9 Here, there is no dispute that the board of
10 commissioners did not make a decision to reconsider the
11 matter within the requisite ten day period. Accordingly,
12 the board of commissioners lacked authority to make a
13 decision on rehearing. The challenged decision is,
14 therefore, erroneous as a matter of law and must be
15 reversed. OAR 661-10-071(1)(c).

16 Two further points merit comment.

17 The county argues that nothing in the local code makes
18 the failure to decide to rehear a matter within ten days a
19 jurisdictional defect. While that may be so, we do not
20 believe it to be dispositive. The question is whether the
21 board of commissioners had the authority to make a decision
22 on rehearing. It did not. Century 21, supra.

23 The county also argues that the board of commissioners'
24 failure to decide the matter within the requisite ten day
25 period is merely a procedural defect, and petitioner
26 establishes no prejudice. We disagree. Century 21, supra,

1 99 Or App at 440 n 5.

2 Under our disposition of the first assignment of error,
3 we must reverse the challenged decision. Accordingly, no
4 purpose is served in reviewing petitioner's other
5 assignments of error.

6 The county's decision is reversed.