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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MOUNTAIN GATE HOMEOWNERS)
ASSOCIATION, RON KACHERGIUS,)
JIM DEARY and JACK BATY,)
)
Petitioners,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent,)

LUBA No. 97-218

FINAL OPINION
AND ORDER

Appeal from Washington County.

Steven R. Schell, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Black Helterline LLP.

Alan A. Rappleyea and Dan R. Olsen, Hillsboro, represented respondent. Jeff H. Bachrach and Andrew Stamp, Portland, filed the response brief. With them on the brief was O'Donnell, Ramis, Crew, Corrigan & Bachrach. Dan R. Olsen and Andrew H. Stamp argued on behalf of respondent.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 03/10/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's dismissal of their local
4 appeal of a subdivision approval.

5 **FACTS**

6 This appeal concerns the timeliness of petitioners' local
7 appeal of the county land development manager's September 12,
8 1997 subdivision approval. The September 12, 1997 approval
9 stated that any appeal to the county hearings officer must be
10 filed no later than 5:00 p.m. on September 22, 1997.
11 Petitioners filed such an appeal on September 22, 1997. The
12 time of that filing is the basis of the dispute in this case.

13 Petitioners contend that they filed their local appeal at
14 5:00 p.m., and thus, it was timely filed.¹ Petitioners
15 explain by affidavits that the appeal documents were delivered
16 to the county administrative offices and that the courier's
17 log book shows that a county administrative service staff
18 person signed for receipt of the appeal at 5:00 p.m.²

19 The county responds with its own affidavits explaining

¹Petitioners' affidavits state that a bike courier picked up the appeal documents from petitioners' then attorney in downtown Portland at approximately 3:13 PM on September 22, 1997. At 3:15 PM the bike courier transferred the appeal documents to a delivery driver to be taken from downtown Portland to Hillsboro. The delivery driver delivered the documents to the county administrative office.

²There are two department reception desks in the public reception area. The county Department of Land Use and Transportation (DLUT) reception desk is equipped with a time and date stamp and is the place where local appeals of land use decisions are accepted until 5:00 PM each day. The other desk is occupied by a staff person for the county Department of Administrative Services and is equipped with an administrative services delivery log. This desk does not customarily accept local appeals of land use decisions.

1 that petitioners' appeal was filed at 5:05 p.m. on September
2 22, 1997, as indicated in its administrative services delivery
3 log.³

4 On October 14, 1997, the land development manager
5 determined that because the appeal was filed after the 5:00 PM
6 deadline, the county had no jurisdiction to consider the
7 appeal, and dismissed it. On October 24, 1997, petitioners
8 filed with LUBA a notice of intent to appeal (NITA) the
9 county's October 14, 1997 dismissal of their local appeal.
10 Subsequent to filing their NITA, on October 27, 1997,
11 petitioners appealed the October 14, 1997 dismissal to the
12 county hearings officer. On November 4, 1997, the county land
13 use manager rejected petitioners' appeal because the county
14 determined that there is no further local appeal available
15 from an appeal dismissed for lack of jurisdiction.

16 Petitioners did not file a NITA challenging the county's
17 November 4, 1997 decision. Nonetheless, petitioners challenge
18 that decision in their first assignment of error. The
19 county's brief defends that decision, and describes the
20 parties' view of LUBA's jurisdiction over that decision as
21 follows:

³In addition to the affidavit of the staff person who accepted the appeal documents from the courier, the county submitted affidavits from several staff members concerning the process for accepting time-sensitive documents, staffing at the reception desks, the accuracy of various timepieces used by county personnel, the schedules and recollections of staff, the data in the county administrative services delivery log and the "military precision with which the county handles appeals * * *." Respondent's Brief 6.

1 "Due to the agreement entered into by the county and
2 the petitioners to consolidate matters related to
3 both the October 14 and November 4 letters, LUBA has
4 jurisdiction to hear issues regarding the merits of
5 both decisions, even though only one Notice of
6 Intent to Appeal was submitted to LUBA."
7 Respondent's Brief 4.

8 **JURISDICTION**

9 We first consider LUBA's jurisdiction to consider
10 petitioners' challenge to the county's November 4, 1997
11 decision.

12 As explained above, on October 24, 1997, petitioners
13 filed their appeal of the county's October 14, 1997 decision.
14 Petitioners did not file a notice of intent to appeal the
15 November 4, 1997 decision with LUBA nor did they submit a
16 second filing fee and deposit for costs. Rather, petitioners
17 and the county agreed to "consolidate" the appeal of the
18 November 4, 1997 decision with the appeal of the October 14,
19 1997 decision. Neither party suggests any authority to
20 support this agreement.

21 As the party seeking review, a petitioner has the burden
22 of establishing LUBA has jurisdiction. Bowen v. City of Dunes
23 City, 28 Or LUBA 324 (1994). In Hood River Sand v. City of
24 Mosier, 23 Or LUBA 701 (1992), we explained that a notice of
25 intent to appeal identifying one land use decision may not
26 later be amended to include a second, different decision,
27 where no notice of intent to appeal the second decision was
28 filed within the time required by statute and no filing fee or
29 deposit for costs had been paid to challenge the second

1 decision. Furthermore, a local government cannot confer
2 appeal jurisdiction on LUBA where jurisdiction does not
3 otherwise exist. Mazeski v. Wasco County, 31 Or LUBA 126
4 (1996).

5 The parties cannot supersede LUBA's statutory
6 jurisdictional requirements through an extrinsic agreement to
7 allow petitioners to challenge a decision for which no NITA
8 was filed. LUBA does not have jurisdiction to consider
9 petitioners' appeal of the county's November 4, 1997 decision.

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioners challenge the county's November 4, 1997
12 letter decision. Because petitioners did not appeal that
13 decision, we do not consider this assignment of error.

14 **SECOND ASSIGNMENT OF ERROR**

15 Petitioners argue that the land development manager
16 erroneously concluded that petitioners' appeal was not timely
17 filed, and therefore improperly dismissed petitioners' local
18 appeal of the September 12, 1997 decision. Petitioners
19 contend that the land development manager's findings, as set
20 forth in his October 14, 1997 decision, are "clearly wrong."
21 We understand their argument to challenge both the adequacy of
22 the county's findings and their evidentiary support.

23 As a review body, we are authorized to reverse or remand
24 the challenged decision if it is "not supported by substantial
25 evidence in the whole record." ORS 197.835(7)(a)(C).
26 Substantial evidence is evidence a reasonable person would

1 accept to reach a conclusion, notwithstanding that different
2 reasonable people could draw different conclusions from the
3 same evidence. Adler v. City of Portland, 25 Or LUBA 546
4 (1993). Reeves v. Washington County, 24 Or LUBA 483 (1993).
5 Where the evidence is conflicting, if a reasonable person
6 could reach the decision the city made, in view of all the
7 evidence in the record, LUBA will defer to the city's choice
8 between conflicting evidence. Mazeski v. Wasco County, 28 Or
9 LUBA 178, 184 (1994), aff'd 133 Or App, 258 (1995); Bottum v.
10 Union County, 26 Or LUBA 407, 412 (1994); McInnis v. City of
11 Portland, 25 Or LUBA 376, 385 (1993).

12 Additionally, findings must (1) identify the relevant
13 approval standards, (2) set out the facts which are believed
14 and relied upon, and (3) explain how those facts lead to the
15 decision on compliance with the approval standards. Heiller
16 v. Josephine County, 23 Or LUBA 551, 556 (1992); see also
17 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
18 21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA
19 829, 835 (1989).

20 In reaching his decision, the land development manager
21 assembled a body of evidence generally in the form of
22 affidavits, some of which was conflicting. In preparing his
23 decision, the land development manager identified the relevant
24 code standard, set out the evidence specifically describing
25 the statements which he found most persuasive, and explained
26 how those statements led to his decision. In explaining how

1 the evidence led to his conclusion, he explained his choice of
2 conflicting evidence presented in the affidavits.

3 The county's October 14, 1997 findings are both adequate
4 and supported by substantial evidence. Petitioners have not
5 established that the county improperly dismissed petitioners'
6 local appeal of the September 12, 1997 decision.

7 This assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 We understand petitioners to argue that even if
10 petitioners did not timely file an appeal of the county's
11 October 14, 1997 decision, the county should have allowed
12 petitioners' appeal under the doctrine of unique circumstance.

13 Petitioners argue that the doctrine of unique
14 circumstance applies to this appeal because:

15 "Under [the facts set forth in petitioners'
16 affidavits], given the exigencies of modern life,
17 including rapid growth, traffic congestion, and
18 other encumbrances messengers must confront, and no
19 fault by Petitioners or their counsel, it is only
20 fair to protect the Petitioners' due process rights
21 by applying the Doctrine of Unique Circumstance to
22 allow Petitioners to file their September 22, 1997
23 brief [appealing the September 12, 1997 approval],
24 which even if it were late under the Washington
25 County Land Development Manager's interpretation,
26 which Petitioners dispute, it was only by five
27 minutes." Petition for Review 14.

28 As the county explains, while the doctrine of unique
29 circumstance may be applicable to some limited situations in
30 the federal court system, there is no basis for applying that
31 doctrine to local land use decisions in this state. The
32 county's Community Development Code (CDC) 209-3.5 makes

1 failure to timely file a local appeal a jurisdictional
2 defect.⁴ LUBA does not have authority to fashion an equitable
3 remedy to overcome a jurisdictional defect.⁵ See Nehoda v.
4 Coos County, 29 Or LUBA 251, 256; Breivogel v. Washington
5 County, 24 Or LUBA 63 (1992), aff'd, 117 Or App 195 (1992).

6 This assignment of error is denied.

7 The county's decision is affirmed.

⁴CDC 209-3.5 states, in relevant part:

"Failure to file a petition for review with the Department of land Use and Transportation by 5:00 p.m. on the due date, with the fee specified in the Notice of Decision, shall be a jurisdictional defect. * * *"

⁵Petitioners argued in oral argument that the alleged tardiness in petitioners' appeal constituted excusable neglect. Petitioner did not raise this issue in their petition for review, and we do not consider it further. DLCD v. Douglas County., 28 Or LUBA 242, 252 (1994).