

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

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PETER B. HOFFMAN,
Petitioner,

vs.

CITY OF PORTLAND, RKH
DEVELOPERS, INC., ERIC
HOFFMAN and JEAN HOFFMAN,

Respondents.

LUBA No. 81-058

FINAL OPINION
AND ORDER ON REMAND

Remand from the Supreme Court of the State of Oregon.

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BAGG, Board Member; COX, Board Member.

DISMISSED

03/14/83

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 FACTS

3 This case was before the Board in Hoffman v Portland, 294
4 Or 150, ___ P2d ___ (1983); 57 Or App 688, 646 P2d 49; 3 Or LUBA
5 254 (1981). A messenger service hired by Petitioner Hoffman
6 left the petition for review outside of the Board's offices
7 between 5:10 and 5:12 p.m. on June 30, 1981.¹ June 30 was
8 the twentieth day after transmittal of the record, and was,
9 therefore, the final day upon which to file the petition for
10 review.² The petition for review was filed with LUBA the
11 following morning after the office opened.

12 Respondents moved to dismiss the case because the petition
13 for review was filed in excess of the time allowed by OR Laws
14 1979, ch 772, sec 4(6) and LUBA Board Rule 7(A) [OAR
15 661-10-030(1)].³

16 In Hoffman, 3 Or LUBA 254, we dismissed the petition for
17 review because we viewed the 20 day period for filing a
18 petition for review to be mandatory. We relied on Gordon v
19 City of Beaverton, 52 Or App 938, 660 P2d 366 (1981) which we
20 understood to hold that we lacked authority to extend the 20
21 day time period provided in 1979 Or Laws, ch 772, sec 4(6), as
22 amended, within which to file the petition for review.

23 The matter was appealed to the Supreme Court, and the
24 Supreme Court reversed and remanded the decision to LUBA for
25 further proceedings. The Court rejected our and the Court of
26 Appeals' belief that we had no choice but to dismiss the case.
27 The Court said the filing of a notice of intent to appeal gave
28 LUBA jurisdiction over the appeal, and while untimely filing of

1 the petition and brief may be grounds for dismissal, it is
2 not a matter of "jurisdiction" requiring dismissal. The
3 Court noted that we have accepted petitions delivered
4 after 5:00 p.m. if an employee still happens to be in the
5 office. The Court cited Housing Development Corporation
6 of Washington County v City of Hillsboro, 5 Or LUBA 122
7 (1982) wherein a petition was delivered after 5:00 p.m. on
8 the twentieth day and bears the Board's filing stamp
9 showing the twentieth day as the day of delivery. The
10 Court then said:

11 "Perhaps LUBA would reach the same result if an
12 employee returned to the office after dinner and
13 found the petition on the doorstep. From LUBA's
14 past actions, it is difficult to say with certainty
15 what view it would take if a petition were
16 similarly left but found after midnight, or of a
17 respondent's consent given after the belated
18 delivery, if the agency did not consider the
19 question foreclosed by Gordon." Hoffman, 294 at
20 156.

21 The Supreme Court said the petitioner "should have an
22 opportunity to present its arguments for accepting the filing
23 to LUBA free from the constraint of the Gordon ruling that we
24 later held to have been premature." Hoffman, 294 Or App at
25 156.

26 RENEWED MOTIONS TO DISMISS

27 The city and the other respondents renew their motions to
28 dismiss. The city argues we should not accept the petition
because it was not "filed" within the 20 day period
prescribed by Or Laws 1979, ch 772, sec 4(6). The city cites
Blackridge v Herrington, 289 Or 139, 142-43, 611 P2d 292

/ /

1 (1980); and In Re Wagner's Estate, 182 Or 340, 342, 187 P2d 669
2 (1947) to support its view that a filing does not occur until a
3 LUBA official receives the petition and places it among
4 official records. The city contrasts the situation before us
5 with that in Housing Development Corporation of Washington v
6 City of Hillsboro, 5 Or LUBA 122 (1982) because the petition in
7 that case was "filed" as it was delivered to LUBA offices and
8 received by LUBA on the twentieth day after transmittal of the
9 record. In this case, however, the petition was not received
10 until a day after the filing deadline.⁴ The city urges that
11 the petitioner simply has not met the requirement of the law.

12 In the alternative, the city urges that LUBA should not
13 accept the petition because there is no stipulation to extend
14 the 20 day limit as provided in LUBA Rule 16(A)(2), [OAR
15 661-10-075(1)(b)].⁵ The city argues that unless there is
16 some other rule clarifying circumstances under which LUBA may
17 itself or on the motion of a party accept an untimely petition,
18 LUBA should not excuse the late filing in this case.

19 Respondents RHK Developers, Inc. and Eric and Jean Hoffman
20 (RHK) argue LUBA has already answered the question put to the
21 Board by the Supreme Court. Respondents say:

22 "LUBA's own rules show that it has interpreted its
23 authority regarding the acceptance of late petitions
24 for review to be that LUBA may not unilaterally or at
25 the request of less than all the parties to an appeal,
26 grant one party an extension of time to file a
27 petition for review, but that it can grant an
28 extension upon the stipulation of all parties."
Memorandum of RHK at 3. (Emphasis in original).

Respondents RHK then state that LUBA Rule 7(A) clearly states
that noncompliance with the 20 day filing provision will result

1 in dismissal of the appeal. See Footnote 2, supra.
2 Respondents note that 16(A) tempers LUBA Rule 7(A) by
3 permitting extensions of time, but the extensions of time are
4 granted only upon written stipulation. Respondents RHK then
5 say:

6 "When LUBA Rule 16(A) is read together with LUBA Rule
7 7(A) it is clear that LUBA has already interpreted its
8 authority (under 1979 Or Laws, ch. 772) regarding the
9 acceptance of late petitions for review to be that it
10 can do so only under the limited circumstances defined
11 in LUBA Rule 16(A)." Memorandum of RHK at 4.

12 Respondents RHK argue LUBA's interpretation of its authority as
13 expressed in these rules is squarely supported by the enabling
14 legislation. Respondents RHK view these rules of procedure to
15 be "crystal clear."

16 Respondents RHK also distinguish Housing Developing
17 Corporation v City of Hillsboro, supra, from the present case.

18 "Any petitioner who waits until the close of business
19 on the last day for filing before attempting to file a
20 petition for review should be made to bear sole
21 responsibility for getting his petition filed on
22 time. He should also be made to assume the entire
23 risk that if he arrives at LUBA's office after regular
24 business hours, the office may be closed and he will
25 be prevented from filing until the next business day.
26 LUBA should not have to assume any more responsibility
27 than simply staying open during its published business
28 hours. See LUBA Rule 16(J)."⁵ Memorandum of RHK at
7.

23 ARGUMENTS AGAINST DISMISSAL

24 Petitioner Hoffman argues the petition should be accepted
25 because LUBA has a practice of accepting filings after 5:00
26 p.m. Petitioner reviews a number of instances in which
27 petitions for review and other documents have been filed after
28 the close of business hours. Petitioner says LUBA's

1 practices have "created confusion as to precisely when its
2 'normal work day' ends." Memorandum of Petitioner, at 3.
3 Secondly, petitioner argues that LUBA should not enforce its
4 rules arbitrarily. Petitioner argues that LUBA must treat like
5 petitioners in the same manner.

6 "Here, the petitioner arrived at the office between
7 5:10 and 5:12 p.m. of the apparently date. In the
8 cases previously cited, a LUBA staff person happened
9 to be in the office for filing after 5:00 p.m. LUBA
10 treated those documents as timely filed. LUBA should
11 not treat parties in precisely the same position
12 differently due to the mere circumstance of whether a
13 clerical employee happens to work late. LUBA should
14 not engage in such arbitrarily inconsistent action."
15 Memorandum of Petitioners at 4-5.

16 Petitioner argues that LUBA has the authority under 1979 Or
17 Laws, ch 772, sec 4(6), as amended, to accept the late filing.
18 Petitioner argues that while the law says that the petition
19 "shall" be filed within 20 days of the transmittal of the
20 record, it does not provide that failure to so file will result
21 in dismissal. A legislative policy is expressed in section 1 of
22 LUBA's enabling act calls for expeditious resolution of land use
23 matters but also encourages decisions to be made in accordance
24 with sound principles of judicial review. According to
25 petitioner, expeditious review of land use matters means matters
26 will be heard on their merits. Further, petitioner argues that
27 Oregon cases and cases in other jurisdictions hold that late
28 filings will not bar judicial review when the delay is not
significant, prejudiced opponents rights or was the result of
culpable neglect. Petitioner notes that in this particular case
the City of Portland delayed filing the record on three separate
occasions, finally submitting the record three weeks

1 after it was first due.

2 Petitioner then argues that filing the petition 10 to 12
3 minutes late without copible neglect and where opposing parties
4 were not prejudiced is excusable. Petitioner points to court
5 cases wherein late filings did not result in dismissal.
6 Petitioner asks that LUBA apply the same standard.

7 Lastly, petitioner cites LUBA Rule 2 [OAR 660-01-005] and
8 contrasts it with LUBA Rule 7(A) and states that the rules are
9 in conflict.⁶ On the one hand LUBA Rule 2 calls for
10 procedures to allow persons to have a full and fair hearing and
11 on the other hand, LUBA Rule 7(A) provides for dismissal of an
12 appeal upon failure to file a petition for review within the
13 time required. The petitioner's technical violation of the
14 rules did not adversely affect the Board's ability to conduct
15 the review proceeding, according to petitioner; and
16 interpreting the rules so as to require dismissal does not
17 promote justice under these circumstances.

18 DECISION

19 We believe the petition for review should be dismissed. We
20 believe the cases and circumstances cited by petitioner in
21 which the Board has accepted and filed documents after the
22 close of normal business hours are distinguishable from the
23 facts in this case. We don't believe a matter is filed within
24 the meaning of our enabling statute until such time it is
25 placed in the official records of the Board. It is not so
26 placed until it is accepted for that purpose by a Board member
27 or an employee of the Board.⁷ Acceptance and filing in this
28 instance occurred on the twenty-first day after transmittal of

1 the record, one day after the last day for filing of the
2 petition for review as established in 1979 Or Laws and as
3 established by Board rule. Placing the petition for review
4 within reach does not constitute a filing, in our view. See In
5 Re Wagner's Estate, supra, wherein the appellant's counsel laid
6 a notice of appeal on the desk of a deputy clerk. The notice
7 was not discovered until after the time for filing such notice,
8 and the court granted a motion to dismiss on the grounds that
9 no filing occurred. Similarly, in W.J. White Company v Winton,
10 183 P2d 277 (Cal, 1919) the court held that filing was not
11 timely when it was slipped through an office door after hours.

12 We are not persuaded by analogies with court decisions in
13 which a court has exercised discretion to accept late filings.
14 As an administrative agency, we must act within the powers
15 granted us by statute. University of Oregon Cooperative v Dept
16 of Revenue, 273 Or 539, 542 P2d 900 (1975). The statute
17 requires the petition must be filed within 20 days of the
18 transmittal of the record. Absent a rule effective at the time
19 of the filing in this case which might allow for such a filing
20 beyond the time limit imposed by 1979 Or Laws, ch 772, sec
21 4(6), as amended, this case should be dismissed.⁸

22 Dismissed.
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FOOTNOTES

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1 LUBA Rule 16(J) establishes the Board's hours from 8:30 a.m. to 5:00 p.m., Monday through Friday, exclusive of legal holidays.

2 The record was received on June 10, 1981. OR Laws 1979, ch 772, sec 4(6), as amended, provides:

"Within 20 days after the date of transmittal of the record, a petition for review of the land use decision and supporting brief shall be filed with the Board. The petition shall include a copy of the decision sought to be reviewed and shall state:

"(a) The facts that establish that the petitioner has standing.

"(b) The date of the decision.

"(c) The issues the petitioner seeks to have reviewed."

3 LUBA Rule 7(A) provides:

"The petition for review shall be filed with the Board and served on the governing body and all parties who have filed a Notice of Intent to Participate or intervened within 20 days after the date the record is received by the Board. Failure to file a petition for review within the time required will result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body."

4 In City of Hillsboro v Housing Development Corporation of Washington County, the Court of Appeals upheld our denial of a motion to dismiss a petition on the grounds that the petition had been filed eleven minutes after the close of business on the twentieth day after transmittal of the record. The Court noted that the petition and brief were "filed within 20 days, albeit eleven minutes after LUBA's official closing time." 61 Or App 484, 487, ___ P2d ___ (1983).

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LUBA Rule 16(A)(2) provides:

"A written stipulation consenting to an extension of time for filing the petition for review or respondent's brief must be accompanied by a written stipulation signed by all the parties to the appeal consenting to the extension. A written stipulation consenting to an extension of time for filing respondent's brief must also contain a provision consenting to an extension of the time within which the Board is required to issue a final order by an amount of time equal to the extension stipulated by the parties."

6

LUBA Rule 2 provides:

"The procedures established in these rules are intended to provide for the speediest practicable hearing and decision in the review of land use decisions while affording all interested persons reasonable notice and opportunity to participate, reasonable time to prepare and submit their cases, and a full and fair hearing. The procedures established in these rules seek to accomplish these objectives to the maximum extent consistent with the time limitations placed upon the Board in Oregon Laws, 1979, ch 772. These rules shall be interpreted to effectuate these policies and to promote justice. Technical violations of these rules which do not affect substantial rights or interests of parties or of the public shall not interfere with the review of a petition."

7

In the recent case of Berg v Coos County, Or LUBA _____, Slip Opinion 02/28/83, a messenger appeared with a sealed envelope and left it with a LUBA Board Member who happened to be present afterhours. The messenger was queried as to the content of the envelope, and the messenger simply stated that he was making a delivery. No request for filing, for receipt or other action was made. The envelope was left unopened until the following day when it was found to contain a notice of intent to appeal including the required \$150 deposit for costs and \$50 filing fee. The Board treated the filing as late, having occurred on the twenty-first day after the local government's land use decision was made, and dismissed the case.

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The rule allowing late filings of the petition for review only upon stipulation is now in effect, however.