



1 COX, Referee.

2 This matter is before the Board on motion of respondent  
3 Polk County for an order dismissing the above entitled case.  
4 Respondent files the motion on the ground that petitioner has  
5 failed to file a legally sufficient petition for review in a  
6 timely fashion.

7 FACTS

8 The notice of intent to appeal was filed with the Land Use  
9 Board of Appeals on June 11, 1982, appealing Ordinance No. 294  
10 adopted by Polk County on May 12, 1982. The record was filed  
11 with LUBA on July 28, 1982. On August 17, 1982 this Board  
12 received a letter from petitioner, which stated:

13 "All of the parties to this proceeding now pending  
14 before this Board have agreed to settle this case on  
15 the following terms: (1) the Polk County Board of  
16 Commissioners will repeal the rezoning ordinance that  
17 is the subject of this appeal to this Board and adopt  
18 a new ordinance in Polk County Zone Change Case No.  
19 82-2; (2) that new ordinance will include the reasons  
20 for granting the zone change that were orally stated  
21 by the County Commissioners at the time they adopted  
the motion to approve Zone Change 82-2; (3) because  
Polk County has agreed to modify the ordinance that is  
the subject of this appeal, petitioner has agreed to  
move for dismissal of this appeal; and (4) all parties  
will be responsible for their own costs on this  
appeal, except that the parties agree that  
petitioner's \$150 deposit-for-costs be returned to him.

22 "The parties request that this Board enter an order in  
23 accordance with their agreement. If necessary, we  
24 will submit a stipulation executed by all parties. If  
jurisdictionally necessary, please accept this letter  
in lieu of petitioner's Petition for Review, due this  
date." (Emphasis added).

1 On August 27, 1982, we received the subject motion for  
2 dismissal. In the supporting memorandum to its motion the  
3 county explains:

4 "Although the county was approached in early August  
5 concerning a compromise settlement of this appeal, the  
6 terms upon which the county was willing to settle did  
7 not include a return of deposit to petitioner. \* \* \* \*

8 "Petitioner did not attempt to negotiate a compromise  
9 with Polk County until just prior to the filing  
10 deadline, and then misrepresented the substance of a  
11 compromise agreement to this Board. \* \* \* \*

12 "A petitioner should not be allowed to unilaterally  
13 create a situation, and then benefit therefrom, by  
14 obtaining additional time in which to file a Petition  
15 for Review. The LUBA statutory scheme envisions a  
16 tight time line for resolution of land use appeals and  
17 no facts are present here to necessitate an extension."

18 Respondent then argues that the above quoted August 17, 1982  
19 letter should not be accepted as a petition for review because  
20 it doesn't meet the statutory definition of a petition for  
21 review.

22 Oregon Laws 1979, ch 772, as amended by Oregon Laws 1981,  
23 ch 748, sec 4(6) provides that:

24 "Within 20 days after the date of transmittal of the  
25 record, a petition for review of the land use decision  
26 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."

Petitioner has not complied with the above quoted statutory

1 requirements. However, LUBA Procedural Rule 7(D) states:

2 "(D) Amended Petition

3 "A petition for review which fails to comply with  
4 subsections (B) or (C) of this section may, with  
5 permission of the Board, be amended. The Board shall  
6 determine whether to allow an amended petition for  
7 review to be filed in accordance with the provisions  
8 in Section 2 of these Rules."

9 The referenced subsection (C) in Procedural Rule 7(D) states in  
10 pertinent part:

11 "The petition for review shall contain petitioner's  
12 brief and shall:

13 "(1) Set out the facts that establish that the  
14 petitioner has standing. \* \* \* \*

15 "(2) Open with a clear and concise statement of the  
16 case which shall set forth in the following order  
17 and under separate headings:

18 \* \* \*

19 "(b) A succinct and clear summary of arguments  
20 appearing in the body of the petition for  
21 review;

22 "(c) A concise but complete summary of the facts  
23 of the appeal material to the determination  
24 of the question or questions presented for  
25 review. \* \* \* \*

26 Broadly read, LUBA Procedural Rule 7(D) allows this Board  
the discretion to permit a petitioner to amend his or her  
petition for review to correct a failure to strictly comply  
with the terms of Oregon Laws 1979, ch 772, as amended by  
Oregon Laws 1981, ch 748, sec 4(6) supra. Given the apparent  
conflict between the statutory requirements and Board  
Procedural Rule 7(D), two questions arise:

1 (1) Does this Board have the authority to adopt or  
2 implement Procedural Rule 7(D) since it in effect allows LUBA  
3 discretion to require less than strict compliance with a  
4 statutory procedural requirement? (2) If we have the  
5 authority, would exercising our discretion in this case achieve  
6 the purposes set forth in LUBA Procedural Rule 2?<sup>1</sup>

7 We answer the first of the two above posed questions in the  
8 affirmative.<sup>2</sup> In Gordon v. Beaverton, 52 Or App 937, 942;  
9 630 P2d 366 (1981); aff'd 292 Or 228 (1981), the Court of  
10 Appeals stated:

11 "The correct inquiry is whether relief from a  
12 statutory procedural requirement is either expressly  
13 forbidden by the statute or is inconsistent with its  
14 provisions and objectives."

15 The discretion allowed by LUBA Procedural Rule 7(D) is not  
16 expressly forbidden by the provisions of LUBA's organic statute  
17 found in Oregon Laws 1979, ch 772, as amended by Oregon Laws  
18 1981, ch 748. A review of LUBA's organic statute further  
19 indicates that nothing in Procedural Rule 7(D) is inconsistent  
20 with its provisions and objectives. The Legislative policy in  
21 creating LUBA is stated in Oregon Laws 1979, ch 772, as amended  
22 by Oregon Laws 1981, ch 748, sec 1(a).

23 "It is the policy of the Legislative Assembly that  
24 time is of the essence in reaching final decisions in  
25 matters involving land use and that those decisions be  
26 made consistently (sic) with sound principles  
governing judicial review. It is the intent of the  
Legislative Assembly in enacting sections 1a to 6a of  
this 1979 Act to accomplish these objectives."

In analyzing the issue before us "consistently (sic) with

1 sound principals governing judicial review", we can not,  
2 however, overlook the rule cited by the Gordon court that when  
3 interpreting statutes bearing on their own jurisdiction,  
4 appellate courts have adhered to the principal that doubts are  
5 to be resolved in favor of the right to appeal. See e.g. David  
6 M. Scott Construction v. Farrell, 285 Or 563, 568, 592 P2d 551  
7 (1979). Also, a petition for review, filed within 20 days,  
8 containing insufficient material would nevertheless be timely  
9 filed. The insufficient petition for review would still cause  
10 the 90 day period in which this Board has to issue its final  
11 order to start to run. Oregon Laws 1979, ch 772, sec 4(8), as  
12 amended by Oregon Laws 1981, ch 748. Procedural Rule 7(D)  
13 granting this Board's discretion to permit amendment of a  
14 petition for review is not inconsistent with LUBA's mandate to  
15 issue final decisions within those 90 days. We conclude we are  
16 permitted to implement Procedural Rule 7(D).

17 We now address the second question which is whether  
18 allowing a amendment to the petition for review in this case  
19 will accomplish the purposes set forth in LUBA Procedural Rule  
20 2 (see footnote 1). We determine that to allow an amendment to  
21 the petition for review in this case will not further the  
22 purposes set forth in Procedural Rule 2. To allow the  
23 requested amendment would not permit this Board to accomplish  
24 the objective set forth in Procedural Rule 2 of attaining "the  
25 speediest practicable hearing and decision in the review of  
26 land use decisions while affording all interested persons

1 reasonable notice and opportunity to participate, reasonable  
2 time to prepare and submit their cases, and a full and fair  
3 hearing."

4 Pursuant to LUBA Procedural Rule 8(A) respondent's brief  
5 "shall be served and filed with the Board within 40  
6 days after the date the record is received by the  
Board."

7 As a practical matter, the respondent's brief is due 20 days  
8 after the petition for review has been filed since the petition  
9 for review is due 20 days after the record has been settled.  
10 If, as in the case before this Board, the petitioner fails to  
11 identify those issues which he intends to litigate, the  
12 respondent is placed in a position of not knowing, in a timely  
13 manner, to what it must respond.<sup>3</sup> Furthermore, as a policy  
14 matter, a great deal of additional work would be placed upon  
15 this Board and respondents to review and answer motions for  
16 amendments to petitions for review. Those motions could be  
17 used merely as a means of extending the time the petitioner has  
18 to prepare an adjudicable petition for review. Such  
19 extensions would interfere with this Board's scheduling of  
20 respondent's brief and oral argument, coordination with LCDC in  
21 goal issue cases, and hinder our ability to meet the 90 day  
22 time requirements set forth by statute. See B & L Holdings v.  
23 Corvallis, 1 Or LUBA 204 (1980).

24 Therefore, we find this Board has the authority to adopt  
25 and implement a rule granting itself the discretion set forth  
26 in LUBA Procedural Rule 7(D). The rule's effect is not

1 expressly forbidden and it is consistent with the legislative  
2 policy of speedy decisions made consistent with sound  
3 principles of judicial review. We further find that to  
4 exercise that discretion in this case, however, would be  
5 inconsistent with LUBA Procedural Rule 2.

6 Dismissed.

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1 FOOTNOTE

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LUBA Procedural Rule 2 states:

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

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22 Initially it should be pointed out this Board does not  
23 believe the failure to properly file a petition for review is  
24 jurisdictional. LUBA has taken the position that we acquire  
25 jurisdiction over a subject matter with the filing of a notice  
26 of intent to appeal. See Gordon v. City of Beaverton, 52 Or  
App 937 (1981), aff'd , 292, Or 228 (1981).

27 In Gordon v. City of Beaverton, the Court of Appeals  
28 affirmed this Board's ruling that we are without authority,  
29 short of a stipulation by all the parties, to extend the time  
30 for filing a petition for review. The court also indicated  
31 LUBA Procedural Rule 16B, which permitted an extension of time  
32 to file the petition for review, upon stipulation of all the  
33 parties, was inappropriate. See also Hoffman v. City of  
34 Portland, \_\_\_ Or App \_\_\_ (CA No. A21857, June 9, 1982). In  
35 Gordon, the court's basis for its ruling was that the  
36 Legislature, in establishing LUBA, had indicated time is of the  
essence in reaching final decisions.

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39 Although not necessarily outcome determinative, it should  
40 be noted that petitioner has not attempted to file an amended  
41 petition for review.