

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

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CITY OF BEAVERTON,
Petitioner,
vs.
WASHINGTON COUNTY,
Respondent.

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LUBA No. 82-047

FINAL OPINION
(ORDER OF DISMISSAL)

Appeal from Washington County.

Eleanore S. Baxendale, Beaverton, filed the Petition for Review and argued the cause on behalf of Petitioner.

Gregory S. Hathaway, Hillsboro, and DeMar L. Batchelor, Hillsboro, filed the brief and argued the cause on behalf of Respondent Washington County and Intervenor J. Peterkort & Company.

Edward J. Sullivan, Portland, filed the brief on behalf of Intervenor Neighbors.

BAGG, Board Member; Cox, Board Member; participated in this decision.

DISMISSED 1/10/83

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 NATURE OF THE DECISION

3 In its notice of intent to appeal, the City of Beaverton
4 states it is appealing

5 "[m]inute Order, 82-224, orally made May 11, 1982, and
6 which became final when approved in the minutes on May
7 25, 1982 which denied reconsideration of the Board of
8 Commissioners' order of April 20, 1982; Washington
9 County Board of Commissioners', Resolution and Order
10 Dismissing Appeal of the City of Beaverton In the
11 Matter of the Application of J. PETERKORT & COMPANY
12 for Plan Amendment to Plan of Development No. 17, Item
13 No. 81-411M, signed April 20, 1982 which became final
14 on May 25, 1982, and which dismissed the City of
15 Beaverton appeal of the Planning Commission decision
16 for lack of jurisdiction; Washington County Planning
17 Commission Order Approving Item No. 81-411M In the
18 Matter of Application of J. PETERKORT & COMPANY for
19 Plan Amendment to Plan of Development No. 17, findings
20 for which were adopted February 10, 1982, which became
21 final on May 25, 1982, and which granted a change in
22 the Plan and was based on an oral decision by the
23 Planning Commission that this land use decision is
24 legislative."

25 In this opinion, we will discuss two issues: First, whether
26 the Washington County Board of Commissioners correctly
27 dismissed the city's appeal; and, second, whether the city may
28 nonetheless bring the above referenced planning commission
29 order to us for review.

30 FACTS

31 Applicant J. Peterkort & Company filed a request to amend
32 the Washington County Plan Map to allow the development of
33 approximately 177 acres of land north of the City of
34 Beaverton.¹ The proposal included a number of changes in
35 plan designations to facilitate urban uses on the property.

1 At a November 12 meeting of the county planning commission,
2 the city submitted a number of questions including a question
3 as to whether this particular proposal was in the nature of a
4 legislative or quasi-judicial plan amendment. At the December
5 30 meeting, the Washington County Planning Commission ruled
6 that the application under review was quasi-judicial and not
7 legislative over city arguments to the contrary. On January
8 18, 1982, the planning commission orally approved the
9 application with conditions. On February 10, 1982, the
10 planning commission orally adopted a proposed order submitted
11 by the applicant.

12 On February 22, 1982, the city filed a notice of review
13 with the Washington County Board of Commissioners requesting a
14 de novo hearing on portions of the application. Along with the
15 notice, the city paid a filing fee and a deposit for the
16 estimated cost of a transcript of the planning commission
17 proceedings. On April 1, 1982, the county delivered a
18 transcript and a bill for the balance of \$455.00. The bill was
19 to be paid within ten days. On April 7, 1982, the Washington
20 County Board of Commissioners considered the city's request for
21 a de novo hearing and denied the request.

22 On April 13, 1982, the applicant raised an issue of
23 jurisdiction based on the city's alleged non-payment of the
24 balance of the transcript cost. The city paid completely for
25 the transcript on that same date which was the eleventh day
26 after billing. The county board set a hearing on the issue of

1 jurisdiction for April 15, 1982. Before the April 15 meeting,
2 the applicant filed a written motion to dismiss the appeal for
3 lack of jurisdiction owing to the city's late payment of the
4 balance of the transcript cost.

5 At the April 15 hearing, the board considered the arguments
6 over jurisdiction and decided that it lacked jurisdiction to
7 hear the appeal. On April 20, 1982, the Washington County
8 Board of Commissioners issued an order dismissing the appeal.
9 The city filed a motion to reconsider on April 28, and on May
10 11, the board orally declined to reconsider. This appeal
11 followed.

12 ASSIGNMENTS OF ERROR

13 The city makes three assignments of error as follows:

14 (1) "It is error to allow the Planning Commission to
15 make final decisions on quasi-judicial amendments
16 to the comprehensive plan map and to require an
17 appeal from the Planning Commission to the Board
of County Commissioners pursuant to Article I,
section 12(c)(1) of the Washington County
Community Development Ordinance."

18 (2) "The Planning Commission erred in designating
19 Item No. 81-411M a quasi-judicial decision
instead of a legislative decision."

20 (3) "The Board of Commissioners erred in dismissing
21 the City's appeal for lack of jurisdiction."

22 We will begin with a discussion of petitioner's third
23 assignment of error. We will then discuss whether we may
24 review the planning commission decision itself.

25 PETITIONER'S ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

26 In summary, petitioner has two arguments. First,

1 petitioner recites it filed a timely notice of review and paid
2 the required fees and deposit for the transcript. Petitioner
3 asserts that this act conferred jurisdiction upon the Board of
4 Commissioners. Second, the county board, in considering
5 petitioner's request for a de novo hearing, exercised its
6 jurisdiction and began to act on the appeal, according to
7 petitioner. The city argues that "[o]nce jurisdiction exists,
8 it cannot be lost." Petition for Review at 24.

9 In support of its first argument, petitioner relies on its
10 construction of the Community Development Ordinance of
11 Washington County. Ordinance Section 2201-4.1 requires a
12 notice review to be received by the planning director within
13 ten days of "initial action," or the Board of Commissioners may
14 act on its own to review a decision within 15 days thereof.
15 Petitioner says the notice of review was filed within ten days
16 of the planning commission's initial action. The "initial
17 action" in this case was the planning commission's approval of
18 the comprehensive plan amendment request.² Section 2201-4.4
19 lists the items that must be included in a notice of review,
20 and provides, in part, that the notice of review

21 "shall be accompanied by the required fee pursuant to
22 Chapter 2400 plus a deposit to cover the estimated
23 costs of the transcript as specified by the planning
24 director, which deposit shall be paid within five days
25 of such estimate by the Planning Director. Within ten
26 days of such notice of completion of a required
transcript, the party seeking review shall transmit
the balance due of any required transcript fee to
[sic] be returned to the depositing party. Failure to
comply with this subsection shall be a jurisdictional
defect. Notice of review shall be a condition

1 precedent to judicial review of final orders pursuant
2 to Section 2301." Community Development Ordinance of
Washington County, Section 2201-4.4.3

3 Petitioner characterizes the issue in the case to be
4 whether an event subsequent to the initial filing of the notice
5 of review, the payment of the balance of the transcript cost,
6 is a condition precedent to preventing the planning commission
7 decision from becoming final. Petitioner claims filing the
8 notice of review prevents the planning commission decision from
9 becoming final. Presumably, petitioner is relying on Section
10 2201-4.1.

11 "The decision of the hearings officer or body shall be
12 final unless a notice of review from an aggrieved
13 party is received by the planning director within ten
14 days of initial action on a proposed action or unless
the board, on its own motion, orders review within 15
days of initial action." Section 2201-4.1 (Emphasis
added).

15 We understand petitioner to argue that the filing of the notice
16 somehow does away with the finality of the planning commission
17 decision. Petitioner concludes that

18 "The planning commission decision is precluded from
19 finality by filing the notice of review within ten
20 days, then the board must take jurisdiction at that
time." Petition for Review 28.

21 Petitioner argues that construing the ordinance to make
22 jurisdiction dependent upon not only the filing of the notice
23 but also the payment of all fees including any balance due on
24 the transcript is a waste of time.

25 "To require a series of steps stretching out for
26 months before jurisdiction is acquired is impractical,
and would completely undermine the purpose and effect

1 of the ten day notice requirement in Section
2 2201-4.1." Petition for Review at 28.

3 Petitioner asserts its reading of the ordinance finds
4 support in public policy. As a matter of public policy, late
5 payment of fees does not "vitate the effectiveness of a notice
6 of appeal or prelude [sic] the conference of jurisdiction,"
7 according to petitioner. Petition for Review at 29.

8 Petitioner points to U.S. National Bank v Lloyds, 239 Or 298,
9 382 P2d 851 (1964), wherein the court held that failure to pay
10 a fee did not rob the court of jurisdiction. We understand the
11 case to hold that where a public officer accepts a document for
12 filing without the fee, the document is nonetheless filed.

13 Petitioner quotes the court as saying that the purpose of
14 requiring a fee to be paid is "to collect the fee, not to
15 govern the validity of documents;" and, once a document has
16 been accepted, "the time for payment is secondary to the actual
17 payment." U. S. National Bank, 239 Or at 306, Petition for
18 Review at 30. The statute controlling the case did not provide
19 that payment of fees was "jurisdictional," however. Petitioner
20 goes on to say the policy of the State of Oregon is to
21 "guarantee the validity of documents which have been accepted,
22 regardless of late payment." Petition for Review at 30.⁴

23 Petitioner urges the county ordinance be read with this policy
24 in mind.

25 In the second argument, petitioner claims the county's
26 consideration of the city request for a partial de novo hearing

1 serves to preclude this dismissal. The Washington County Board
2 of Commissioners acted on the request and set a time for the
3 first public hearing on the appeal before the due date for
4 final transcript payment. Petitioner posits the county thereby
5 exercised jurisdiction over the appeal; and, concludes
6 petitioner, once the board exercises its jurisdiction, the
7 jurisdiction may not be lost.

8 RESPONDENTS' ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

9 At the outset, respondent says the only decision before the
10 Land Use Board of Appeals is the April 20, 1982 resolution and
11 order dismissing the petitioner's appeal. The basis of the
12 county board's decision was petitioner's failure to perfect its
13 appeal. Respondent county argues ORS 215.422(1)(a) provides
14 that the procedure and type of hearing for an appeal to the
15 governing body from a planning commission or hearings officer
16 is to be prescribed by the governing body. Washington County's
17 choice of steps necessary to perfect jurisdiction has been set
18 down by the county in accordance with that statute. The steps
19 are clear and are within the county's authority, argues
20 respondent.

21 Respondent advises the first step for an appellant seeking
22 to appeal a hearings officer or planning commission decision is
23 to file a notice of review within ten days of the decision.
24 Section 2201.41. Respondent notes the petitioner complied with
25 this section. Section 2201-4.4 requires a fee plus a deposit
26 must accompany the notice of review, and while the fee is for a

1 specific amount, the transcript deposit varies from case to
2 case, depending on the estimated length of the transcript. The
3 deposit is not due until five days after an estimate of the
4 transcript cost is made by the planning director, and
5 petitioner paid this advanced transcript payment on time. When
6 the transcript is completed, petitioner is given a ten day
7 notice that the balance is due. This final payment is the
8 third step in perfecting jurisdiction and is expressly made a
9 jurisdictional prerequisite by Section 2201-4.4, claims
10 respondent. It is this section to which petitioner failed to
11 adhere, making the required final payment on the eleventh day
12 after the notice of the balance due.

13 In response to petitioner's insistence that the county
14 exercised jurisdiction over the dispute by considering the
15 city's request for a partial de novo review, respondent says
16 that whether or not the county board decides to hold the review
17 de novo or on the record, a transcript is necessary. The
18 transcript is necessary in order to determine whether the
19 record needs to be opened to allow additional testimony or
20 evidence.⁵ See Section 2201-4.5 and 2201-4.7. Consideration
21 of the scope of any appeal hearing is a procedural act that has
22 nothing to do with the merits of the case, and action on the
23 merits of the dispute comes only after all jurisdictional steps
24 are completed, according to the county.

25 Respondent concludes the ordinance is clear: The ordinance
26 provides that failure to pay the fees and comply with all the

1 jurisdictional steps outlined in the county ordinance "shall be
2 a jurisdictional defect." Section 2201-4.4. Respondent points
3 to use of the word "shall" to illustrate the county's intent to
4 give itself no discretion as to whether to hold an appeal
5 without fees. The county advises the ordinance makes all fees
6 and charges "jurisdictional" to ensure that those who seek
7 review bear the cost and to ensure that the county is
8 reimbursed for its expenses. There is no provision for waiver
9 of fees, and any waiver granted by the board would be
10 inconsistent with the ordinance and the county's policy
11 requiring the transcript to be paid for by the appellants.

12 DECISION

13 We think petitioner's argument that filing of the notice of
14 review makes the planning commission decision no longer final
15 unnecessarily complicates matters. Section 2201-4.1 provides
16 that the lower decision is final "unless a notice of review" is
17 filed. This section does not act to somehow confer
18 jurisdiction upon the Board of Commissioners or force the Board
19 of Commissioners to take an appeal anytime a notice of review
20 is filed. The language simply makes it clear, when read with
21 the rest of Section 2201-4.1, that lower body decisions are
22 final but are subject to a properly perfected appeal. The
23 provisions that control review by the county board are
24 provisions controlling the filing of the notice including, we
25 believe, the required fees. The county has made the notice of
26 review and the fees a requirement of jurisdiction or, at least,

1 of its willingness to continue to act on an aggrieved party's
2 request for review.

3 In any event, whether or not "jurisdiction" is conferred
4 upon the county board with the filing of the notice of review,
5 or whether "jurisdiction" is conferred only upon payment of all
6 fees and charges within the time specified is not important to
7 the outcome of this case. "Jurisdiction" is exercised pursuant
8 to legal authority, and the county certainly has legal
9 authority to conduct reviews of planning commission land use
10 decisions. What emerges from the county ordinance is an intent
11 to hold any petitioner to time limits for payment of fees and
12 charges. The county ordinance makes it clear the county does
13 not intend to entertain appeals which have not been filed and
14 fully paid for within the times prescribed. We know of no
15 prohibition against a county establishing such strict
16 requirements; indeed, the matter of procedure for the conduct
17 of appeals within the county is a matter for the county. ORS
18 215.422(1)(a). Even if filing the notice of review and payment
19 of fees is all that is necessary to confer "jurisdiction" on
20 the board of commissioners, we believe the county may retain
21 the authority to dismiss an appeal for failure to follow a
22 lawful requirement clearly stated in the ordinance.⁶

23 REVIEW OF PLANNING COMMISSION ACTION

24 The second issue raised in this appeal is whether the
25 planning commission correctly characterized the plan amendment
26 proceeding as "quasi-judicial." We do not reach this issue

1 because we do not believe petitioner may now bring it to us as
2 a separate land use decision. See petitioner's notice on page
3 2, supra, and petitioner's assignments of error 1 and 2, page
4 4, supra. We are aware of petitioner's claim that the planning
5 commission view of an application as "quasi-judicial" or
6 "legislative" is not reviewable by the county board because
7 Article I; Section 12(C) of the Community Development Ordinance
8 states that "[i]n case of a controversy as to whether a matter
9 be deemed a legislative, administrative, quasi-judicial matter
10 the decision of the planning commission shall be final."
11 However, we question whether this procedural decision is a
12 "final decision or determination" reviewable under 1979 Or
13 Laws, ch 772, sec 4, as amended. See ORS 197.015(10). If it
14 is a final decision, unreviewable by the board of
15 commissioners, petitioner has brought the matter to us more
16 than 30 days after the decision and is, therefore, too late.
17 See 1979 Or Laws, ch 772, sec 4(4), as amended. If the
18 planning commission determination is somehow an interlocutory
19 determination, then we believe the ordinance may be read to
20 allow the board of commissioners to review this issue on
21 appeal. It makes little sense to read the provision to bind
22 the board of commissioners to a procedural decision of the
23 planning commission where the board of commissioners has the
24 authority, under the county ordinance, to review a planning
25 commission decision and overturn it in whole or in part.⁷
26 Also, we do not understand how the provision could be given

1 that effect. If a "quasi-judicial" plan change were appealed
2 to the board of commissioners and the board were to believe the
3 matter to be legislative, would the board of commissioners be
4 precluded from overturning the planning commission decision and
5 starting legislative proceedings because of this provision?
6 This result would rob the board of commissioners of its
7 legislative authority. Given our uncertainty about what the
8 word "final" means, as used in Article I, Section 12(C), we
9 prefer to read the ordinance to let the county decide this
10 procedural issue in the course of an appeal.⁸

11 . Petitioner's argument that the planning commission had no
12 power to make a comprehensive plan change as the one here must
13 be first considered by the county commissioners. The county
14 ordinance provides for county commissioner review of planning
15 commission decisions, and we do not believe this county
16 ordinance may be read to allow direct appeals from the planning
17 commission to this board, at this date, where a route of appeal
18 was available to petitioner. Oregon Laws 1979, ch 772, as
19 amended by Oregon Laws 1981, ch 748, is structured so as to
20 require a potential appellant to this Board to make use of
21 whatever appeal provisions the local governing body provides.
22 Petitioner is precluded from attacking the decision here
23 because petitioner did not perfect its appearance before the
24 county. 1979 Or Laws, ch 772, Sec 4(2), as amended. Griffiths
25 v Portland, 1 Or LUBA 192 (1980); Save Otter Rock's Environment

1 v Lincoln County, 2 Or LUBA 261 (1981).

2 This case is dismissed.

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FOOTNOTES

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The county in its brief, argues that the subject area of the application is 149.2 acres. The findings submitted by the applicant, however, refer to the size of the affected property as 177 acres.

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The planning commission orally adopted the applicant's proposed order on February 10, 1982, and the city's notice of review was filed on February 22, 1982. Ten days after the decision fell on a Saturday, with Monday the 22nd of February being the next judicial day. See ORS 174.120.

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We believe the copy of this provision furnished in the record omits a portion of the sentence beginning "within ten days * * *" and ending "* * * depositing party." We assume the sentence is intended to mean that a balance due for the transcript shall be paid to the county, and any overpayment of a deposit for the transcript shall be returned to the depositing party.

4

The city points to ORS 19.035 as an example of a state policy not to make fee payments jurisdictional prerequisites. ORS 19.035 is about appeal fees in appellate courts. Petitioner also cites Osborne v Lane County, 4 Or LUBA 368 (1981) in which this Board allowed the filing of an appeal fee and deposit for the cost of preparation of the record after a notice of appeal had been filed and accepted by the Board. However, 1979 Or Laws, ch 772, as amended, and our rules, OAR 660-000-01 et seq, do not provide, as the county ordinance provides, that the filing of a fee and a deposit is itself jurisdictional.

5

"The Board may admit additional testimony and other evidence without holding a de novo hearing or hear the entire matter de novo if it is satisfied that the testimony of other evidence could not have been presented at the initial hearing. In deciding such admission, the Board shall consider:

- 1 "a. Prejudice to parties;
- 2 "b. Convenience or availability of evidence at the
3 time of the initial hearing;
- 4 "c. Surprise to opposing parties;
- 5 "d. When notice was given to other parties as to an
attempt to admit; and
- 6 "e. The competency, relevancy and materiality of the
7 proposed testimony or other evidence.

8 "Upon the decision to admit additional testimony or
9 other evidence, or to hear the entire matter de novo,
10 the presentation of such testimony and evidence shall
be governed by the procedures applicable to the
11 presentation of such matters at the initial hearing."
Section 2201-4.7

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6
Petitioner does not challenge the county's authority to
13 require payment for a transcript, and we do not understand
petitioner to challenge the legality of Section 2201-4.4, supra.

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7
The ordinance limits what the county board may review to
15 "the grounds relied upon in the petition or request for review
16 provided for in Section 2201-4.4(C) of this Article. Community
17 Development Ordinance of Washington County, Section 2201-4.6.

18 "Once appealed the Board may affirm, reverse or amend
19 the action of the initial hearings officer or body and
may reasonably grant approval subject to conditions
20 necessary to carry out the Comprehensive Plan and as
provided for in Section 2201-3.7. The Board may also
21 remand the matter back to the hearings officer or body
for additional information.

22 "a. For all cases the Board shall make findings based
23 on the record before it and any testimony or
other evidence received by it as justification
for its action.

24 "b. The Board shall state all orders upon the close
25 of its hearing or upon continuance of the matter
to a time certain." Community Development
26 Ordinance of Washington County, Section 2201-4.8.

2 Respondent J. Peterkort & Company argued at the
3 hearing on this matter that petitioner should have
4 appealed the planning commission decision to this Board
5 as a final decision. Respondent county, however, appears
6 to take the position that the planning commission
determination is a procedural issue, and as a procedural
issue "cannot be raised for the first time on appeal to
this Board." Respondent County's Brief at 16. The county
also states

7 "the February 10, 1982, decision of the planning
8 commission determining, as a matter of procedure,
9 that the proceeding was 'quasi-judicial' and not
10 'legislative' is not properly before this Board under
11 review. The county board did not review that decision
12 and make its own 'decision' to be reviewed here..."

13 We understand the county's comments to be consistent with our
14 view that the planning commission characterization of the
15 proceeding is reviewable by the county board.

16 Another possible interpretation is that the planning
17 commission decision as to a proposal procedural character is
18 itself a "final" decision for appeal purposes which must be
19 appealed to the board of commissioners when made.
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