

LAND USE
BOARD OF APPEALS

FEB 28 2 41 PM '83

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

3 DARLENE BERG,)
4 Petitioner,)
5 v.) LUBA NO. 82-110
6 COOS COUNTY,) FINAL OPINION
7 Respondent.) AND ORDER

8 Appeal from Coos County.

9 Daniel Hoarfrost John K. Knight
Nash & Hoarfrost Asst. County Counsel
10 555 Oregon National Bldg. Coos County Courthouse
Portland, OR 97205 Coquille, OR 97423
11 Attorney for Petitioner Attorney for Respondent

12 Cox, Board Member
13 Bagg, Board Member did not participate in decision.

14 Dismissed. 2/28/83

15 You are entitled to judicial review of this Order.
16 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 COX, Board Member.

2 This matter is before the Land Use Board of Appeals on
3 Respondent Coos County's motion for an order dismissing the
4 appeal on the grounds that LUBA has no jurisdiction under the
5 provisions of Oregon Laws 1979, ch 772, as amended by Oregon
6 Laws 1981, ch 748 and LUBA Rules of Procedure. The facts
7 pertinent to this motion are those set forth in the attached
8 Affidavit of LUBA Board Member John T. Bagg. The controlling
9 law is set forth in Section 4(4) of Oregon Laws 1979, ch 772,
10 as amended by Oregon Laws 1981, ch 748 which provides that:

11 "A notice of intent to appeal a land use decision
12 shall be filed not later than 30 days after the date
the decision sought to be reviewed becomes final.

13 In conjunction with the above quoted statutory provision,
14 this Board adopted a procedural rule set forth in OAR
15 661-10-015(3) which provides:

16 "The notice must be filed with the Board and served on
17 the governing body, the governing body's legal counsel
18 and all persons identified in the notice as required
by subsection 1(F) of these rules within 30 days from
the date of the land use decision."

19 The issue before us is whether a notice of intent to appeal
20 delivered to the Land Use Board of Appeals after closing hours
21 on the 30th day but not received by the Board until it was date
22 stamped on the 31st day was timely filed. We determine that it
23 was not and cite in support of our decision In Re Wagner's
24 Estate, 182 Or 340, 187 P2d 669 (1947). In In Re Wagner's
25 Estate, the court was faced with a fact situation similar to
26 the one at hand. The court held that the act of an appellant's

1 counsel in laying a notice of appeal upon the desk of a deputy
2 county clerk for filing during the absence of the clerk did not
3 constitute a filing of the notice. The notice was not
4 discovered by the deputy clerk until after the period for
5 filing such notices had run and, therefore, the court granted
6 the motion to dismiss the appeal. The court reasoned it is not
7 sufficient to simply deliver the paper or document in a timely
8 fashion, it is also necessary to be received by the proper
9 officer for filing within the time deadline. In Hoffman v.
10 City of Portland, 57 Or App 668, 691, ___ P2d ___ (1982),
11 reversed on other grounds and remanded to LUBA in Hoffman v.
12 City of Portland, 294 Or 150 (1982), the court of appeals
13 stated

14 "We know of no authority that requires LUBA offices to
15 remain open each day until midnight for the purpose of
16 filing documents. LUBA's office hours are published,
17 and nothing in its enabling act or its procedural
18 rules requires, or even suggests, that it open during
19 any other times. Petitioner's contention that
20 'delivery' of the petition to the closed offices of
21 LUBA is a sufficient 'filing' is equally
22 unpersuasive. We have consistently held that 'filing'
occurs when a document is delivered to and received by
the proper official. In re Wagner's Estate, 182 Or
340, 342, 187 P2d 669 (1947); Williams v. Cody, 24 Or
App 433, 545 P2d 905 (1976). Here, notwithstanding
arrival² of the document at 5:10 p.m. on June 30,
'filing' occurred on July 1, 1981 when the petition
and brief were received by LUBA."

22 "
23 "2

23 "The only evidence contained in the record
24 concerning the June 30 'delivery' of the petition for
25 review after 5 p.m. to LUBA offices is an affidavit
submitted by petitioner's counsel to that effect. At
most, it shows an attempted delivery."

26 This Board has previously held, consistent with the

1 holdings of the above mentioned courts, that the 30-day filing
2 requirement for notices of intent to appeal is jurisdictional
3 and can not be extended. See City of Lake Oswego v. Clackamas
4 County, 1 Or LUBA 351 (1980). In Hayes v. Yamhill County, 1 Or
5 LUBA 199, 200 (1980), we stated:

6 "As used in the context of judicial proceedings, the
7 term 'file' means 'to place among official records as
prescribed by law.'"

8 In a case entitled T & G Enterprises v. Jackson County,
9 LUBA No. 81-059, a set of facts similar to that before this
10 Board occurred. In that case, petitioners filed a notice of
11 intent to appeal with the Land Use Board of Appeals at 5:36
12 p.m. on May 1, 1981. May 1, 1981 was the 30th day following
13 the date the decision sought to be reviewed became final.
14 Respondents in that case argued that filing of the notice of
15 intent to appeal after 5:00 p.m. on the 30th day rendered the
16 filing untimely and consequently this Board had no jurisdiction
17 to hear that appeal. We disagreed with respondent and stated

18 "While it is clear that this Board lacks jurisdiction
19 over a land use action if notice of intent to appeal
20 is filed more than 30 days beyond the date of the
final decision being appeal, Oregon Laws 1979, ch 772
is silent as to the hour on which the 30th day
terminates."

21
22 In T & G Enterprises, supra, we pointed to LUBA Procedural Rule
23 2¹ and held in light of the rule and the fact that at the
24 time petitioners filed their notice of intent to appeal this
25 Board "lacked a rule controlling the treatment of materials
26 submitted to this Board" after 5:00 p.m, we denied petitioner's
27 motion to dismiss.

28 The T & G Enterprises case is distinguishable from the

1 facts in this proceeding. In T & G Enterprises an actual
2 filing was made on the 30th day. The notice of intent to
3 appeal was date stamped at 5:36 p.m. on that date. In this
4 case, the only thing that occurred on the 30th day was the
5 delivery of the document. It was not "filed" until the
6 subsequent day.²

7 Based on the foregoing, the respondent's motion to dismiss
8 is granted.

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1

OAR 661-10-005, (LUBA Procedural Rule 2) states:

"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."

2

In addition, we would like to clarify the ruling in T & G Enterprises. In that case we used the word "submitted" in the phrase "the treatment of materials submitted to this Board." The word "submitted" should have been "filed" to be consistent with case law.