

AUG 2 9 52 AM '83

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

3	SCHRIENER'S GARDENS and	)	
	DAVID SCHRIENER,	)	
4		)	
	Petitioners,	)	LUBA No. 83-065
5		)	
	vs.	)	FINAL OPINION
6		)	AND ORDER OF DISMISSAL
	MARION COUNTY,	)	
7		)	
	Respondent.	)	

9 Appeal from Marion County.

10	Jess M. Glaeser	Robert C. Cannon
	Rask, Sweeney,	Marion County Courthouse
11	Kerr & Grim	State & High Streets
	1200 S.W. Main Bldg.	Salem, OR 97301
12	Portland, OR 97205	
	Attorney for	Attorney for
13	Petitioners	Respondent County

14 David A. Rhoten  
 15 Rhoten, Rhoten & Speerstra  
 16 300 Pioneer Trust Building  
 17 Salem, OR 97301  
 18 Attorney for  
 19 Trans Energy Systems, Inc.

BAGG, Board Member

DISMISSED 08/02/83

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 This matter is before the Board on a motion to dismiss  
3 filed by Marion County. Marion County urges dismissal of the  
4 appeal on the ground the petition for review was not filed  
5 within the 20 day period permitted under 1979 Or Laws, Ch 772,  
6 Sec 4(6), as amended by 1981 Or Laws, Ch 748.

7 Petitioners argue the motion should be denied. Petitioners  
8 state that mechanical difficulties caused the petition for  
9 review to be completed after 5:00 p.m. on July 14, 1983. July  
10 14 was the twentieth day after transmittal of the record, and  
11 the day petitioners' petition for review was due. Petitioners  
12 contacted the participant herein and obtained consent for a one  
13 day extension to file the petition. Marion County, however,  
14 refused to grant an extension. Faced with these facts,  
15 petitioners contacted the Board. Petitioners were advised  
16 someone would be in LUBA offices until 6:00 p.m., but  
17 petitioners' counsel arrived at 6:15 and found no means of  
18 gaining entry to the offices of the Land Use Board of Appeals.

19 Petitioners argue that under these facts, LUBA has the  
20 authority to grant a one day extension of time for filing.

21 1979 Or Laws, Ch 772, Sec 4(6), as amended, states the  
22 petition for review and the supporting brief "shall be filed"  
23 with the Board within 20 days after the date of transmittal of  
24 the record. This provision of Oregon Laws is echoed in LUBA  
25 Rule 7(A):

26 "The petition for review shall be filed with the Board

1 and served on the governing body and all parties who  
2 have filed a Notice of Intent to Participate or  
3 intervened within 20 days after the date the record is  
4 received by the Board. Failure to file a petition for  
5 review within the time required will result in  
6 dismissal of the appeal and forfeiture of the filing  
7 fee and deposit for costs to the governing body."  
8 LUBA Rule 7(A)(1), OAR 661-10-030(1).

9 Board rules provide for extensions of time for the filing  
10 of the petition for review.<sup>1</sup>

11 "A motion which seeks to extend the time for filing  
12 the petition for review or respondent's brief must be  
13 accompanied by a written stipulation signed by all the  
14 parties to the appeal consenting to the extension. A  
15 written stipulation consenting to an extension of time  
16 for filing respondent's brief must also contain a  
17 provision consenting to an extension of the time  
18 within which the Board is required to issue a final  
19 order by an amount of time equal to the extension  
20 stipulated by the parties." LUBA Rule 16 (A)(2), OAR  
21 661-10-075(1)(b).

22 There is one additional rule which has some bearing on this  
23 case. LUBA Rule 2 provides that the rules of the Board

24 "are intended to provide for the speediest practicable  
25 hearing and decision in the review of land use  
26 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 on 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." LUBA Rule 2, OAR 661-10-005.

27 The Board has consistently held that failure to file a  
28 petition for review within the 20 days provided in 1979 Or

1 Laws, Ch 772, as amended, and LUBA Rule 7(A) will result in  
2 dismissal of the appeal. Gordon v City of Beaverton, 52 Or  
3 App, 937, 630 P2d 366 (1981), aff'd, 292 Or 228, 637 P2d 125  
4 (1981); Elliott v Lane County, 6 Or LUBA 423 (1982). There  
5 have been circumstances in which petitions for review have been  
6 filed after Board working hours, but on the twentieth day.  
7 Housing Development Corp of Washington Co v City of Hillsboro,  
8 5 Or LUBA 122 (1982). Those circumstances have resulted in the  
9 Board's acceptance of the petition for review as within the  
10 time limit provided in Oregon Laws and Board rule.<sup>2</sup> It is  
11 the Board's view that it may interpret its rules to allow a  
12 filing after normal working hours (providing the petitioner is  
13 fortunate enough to find someone in Board offices) but still  
14 within the 20 day period provided for in Oregon Laws and Board  
15 rule. The Board does not believe it may interpret away its  
16 rule requiring dismissal of a petition not filed within the 20  
17 day period provided in 1979 Or Laws, Ch 772, as amended.<sup>3</sup>

18 The Board's rules do not account for circumstances which  
19 might lead a court with equitable powers to allow for a late  
20 filing. The Land Use Board of Appeals is an administrative  
21 agency and must work within its enabling legislation and its  
22 own rules. Gouge v David, et al, 185 Or 437, 202 P2d 489  
23 (1949); Pacific N.W. Bell v Davis, 43 Or App 999, 608 P2d 547  
24 (1979).

25 This case is dismissed.

FOOTNOTES

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After the Court of Appeals' decision in Hoffman v City of Portland, 57 Or App 688, 646 P2d 49 (1982), rev in Hoffman v City of Portland, et al, 294 Or 150 (1982), the Board passed a temporary rule removing any provision for stipulations to extensions of time to file a petition for review. The temporary rule expired 180 days after its passage. The Board rule allowing such extensions upon stipulation is now in force.

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The Board's hours are from 8:30 a.m. to 5:00 p.m., Monday through Friday, exclusive of legal holidays. LUBA Rule 16(J), OAR 661-10-075(10).

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The exception, as noted earlier, is where the late filing is agreed to by the parties. This agreement is provided for in Rule 16(A)(2), OAR 661-10-075(1)(b).