

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 LINDA S. FORD, JAMES S. FORD  
5 and HOLGER T. SOMMER,  
6 *Petitioners,*

7  
8 vs.

9  
10 JACKSON COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 JOHN C. HILL and WESLEY S. HILL,  
16 *Intervenors-Respondent.*

17  
18 LUBA No. 2007-048

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from Jackson County.

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25 Linda S. Ford, James S. Ford, Applegate, Holger T. Sommer, Merlin, represented  
26 themselves.

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28 Douglas M. McGearry, Medford, represented respondent.

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30 Daniel O'Connor, Medford, represented intervenors-respondent.

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32 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,  
33 participated in the decision.

34  
35 DISMISSED

06/14/2007

36  
37 You are entitled to judicial review of this Order. Judicial review is governed by the  
38 provisions of ORS 197.850.

1 Bassham, Board Member.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision granting a permit for an aggregate mining operation on a  
4 101-acre parcel zoned for exclusive farm use, pursuant to a previously issued Ballot Measure  
5 37 claim.

6 **REQUEST TO RE-OPEN THE RECORD**

7 On April 19, 2007, LUBA issued an order that in relevant part required the county to  
8 submit a supplemental record that included written minutes of hearings by the hearings  
9 officer as required by law, if any such minutes existed. On May 2, 2007, the county  
10 submitted a supplemental record that did not include any minutes, advising LUBA that no  
11 such minutes existed.

12 On May 4, 2007, petitioner Sommer filed a request that LUBA reconsider its April  
13 19, 2007 order, arguing that LUBA should require the county to produce written minutes of  
14 the hearings before the hearings officer from the audio tapes of those hearings that are  
15 already in the record. In an order dated May 15, 2007, we denied that request, noting that  
16 petitioner had identified no legal requirement that the county produce written minutes of the  
17 hearings officer's proceedings. Our May 15, 2007 order settled the record, and set a deadline  
18 of June 5, 2007, for filing the petition for review.

19 On June 5, 2007, petitioners filed a motion to withdraw this appeal, stating that  
20 without written minutes it will be "impossible" for petitioners to make their case. Motion to  
21 Withdraw 1.<sup>1</sup> However, the last two paragraphs of the motion state what appears to be a

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<sup>1</sup> The motion to withdraw states, in relevant part:

"Petitioners come to the conclusion that, without written minutes, it will be impossible to make their case in a Petition for Review. Petitioners' Assignment of Errors cannot rely on substantial evidence from the audio recordings of the public testimony. To bring a typed version of these recording into evidence requires a certified court reporter to transcribe these recordings. The cost to produce transcripts is beyond the budget of the Petitioners. The time

1 request to re-open the record to include a new document, and a request to restart the 21-day  
2 deadline for filing the petition for review:

3 “A few days ago Petitioners became aware of the fact that the Jackson County  
4 Hearings Clerk keeps ‘Notes’ during the hearing (see attached). It is  
5 Petitioners’ opinion that these ‘Notes’ are parts of the record, however [their]  
6 existence was not mentioned by Respondent. Petitioners allege the ‘Notes’  
7 represent, to a certain extent, ‘Minutes’ which the County claimed ‘do not  
8 exist.’

9 “Petitioners withdraw their Appeal (LUBA No. 2007-048), unless the Board  
10 is convinced by this new evidence, that the existence of the above mentioned  
11 ‘Notes’ should have been disclosed and entered into the Record. If LUBA  
12 agrees with Petitioners’ assessment regarding the ‘Notes,” Petitioners then ask  
13 LUBA to settle the Record again and determine a new date, which restarts the  
14 21 day Petition for Review period and admit the ‘Notes’ into the record.”  
15 Motion to Withdraw 2.

16 The county responds that the log notes that petitioners refer to are clerical indexes  
17 and not “minutes” of any kind. The county argues that petitioners’ request to include those  
18 log notes in the record and to restart the 21-day clock for filing the petition for review should  
19 be denied.

20 The log notes attached to the motion for withdraw consist of a table with three  
21 columns. The first column indicates the time, the second column the speaker, and the third,  
22 labeled “Note” gives a one or two-sentence description of the speaker’s statements. The  
23 descriptions include very few details of those statements. For example, the “Note” related to  
24 lead-petitioner Linda Ford sums up over 30 minutes of testimony with the following two  
25 sentences: “[o]ral testimony against the application. Answering questions posed from [the  
26 hearings officer].” Log notes of November 16, 2006 hearing, attachment 1 to the Motion to  
27 Withdraw.

28 We agree with the county that the “Notes” are not minutes of the hearings conducted  
29 by the hearings officer. They appear to be notes taken by the recording clerk, perhaps to

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required to produce transcripts exceeded the statutory 21 day time limit [for] producing the  
Petition for Review.” Motion to Withdraw 1.

1 assist in recording or cataloging the audio tapes of the hearings. Petitioners do not explain  
2 why those notes should be included in the record, if they are not minutes. Petitioners'  
3 request to include the notes in the record is denied.

4 We are not sure what to make of petitioners' complaint that it is "impossible" to  
5 prepare the petition for review without written minutes of the hearings. Our rules provide,  
6 and it is a common practice, for parties to provide their own transcription of relevant portions  
7 of hearings from the audio tapes in the record, and attach such partial transcripts to the briefs.  
8 OAR 661-010-0030(5). There is no requirement that such partial transcripts be prepared by  
9 a certified court reporter. As for timing, petitioners have known since at least May 2, 2007,  
10 that the county has taken the position that no minutes of the hearings exist, and thus that  
11 petitioners may have to rely on party-prepared partial transcripts of the audio tapes.

12 Nor are we sure what to make of petitioners' request to restart the deadline for filing  
13 the petition for review. Even if the "Notes" were included in the record, the descriptions of  
14 testimony in those notes are so sketchy that it is difficult to see why the availability of the  
15 notes in the record would make any difference in preparing the petition for review, or make  
16 any other difference in this appeal. As far as we can tell, petitioners' requests to resettle the  
17 record and restart the deadline for filing the petition for review have no legitimate basis, and  
18 both requests are denied.

19 **MOTION TO WITHDRAW**

20 The county argues that petitioners cite no statutory or rule basis to grant a petitioner's  
21 motion to "withdraw" an appeal. According to the county, OAR 661-010-0030(1) provides  
22 that "[f]ailure to file a petition for review within the time required by this section \* \* \* shall  
23 result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the  
24 governing body," pursuant to OAR 661-010-0075(1)(c).<sup>2</sup> We understand the county to

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<sup>2</sup> OAR 661-010-0030(1) provides:

1 request that the Board dismiss this appeal for failure to file the petition for review within the  
2 21-day deadline specified in our order, rather than allow petitioners' contingent motion to  
3 "withdraw" the appeal.

4 Petitioners' motion to withdraw was filed on June 5, 2007, the date the petition for  
5 review was due. Under usual circumstances, the Board will grant a petitioner's voluntary  
6 motion to dismiss an appeal that is filed on or before the date the petition for review is due,  
7 and will not dismiss such an appeal for failure to file the petition for review within the  
8 deadline set by OAR 661-010-0030(1). *Claremont Limited Partnership v. Washington*  
9 *County*, 28 Or LUBA 785, 786 (1995). One consequence of the latter disposition, as the  
10 county notes, is that OAR 661-010-0075(1)(c) requires forfeiture of the filing fee and deposit  
11 for costs. *See Sommer v. Josephine County*, 52 Or LUBA 783, 785 (2006) (awarding  
12 forfeiture of the filing fee and deposit for costs where LUBA granted the petitioner's motion  
13 to dismiss, but that motion was filed one day after the deadline for filing the petition for  
14 review).

15 The present circumstances, however, are not usual ones. If a petitioner has decided,  
16 for whatever reason, to seek voluntary dismissal of an appeal, to avoid delay and prejudice to  
17 other parties the petitioner should file an unequivocal motion for dismissal as soon as

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"Filing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. See OAR 661-010-0025(2) and 661-010-0026(6). The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or OAR 661-010-0067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. See OAR 661-010-0075(1)(c)."

OAR 661-010-0075(1)(c) provides:

"Forfeit of Filing Fee and Deposit: If a record has been filed and a petition for review is not filed within the time required by these rules, and the governing body files a cost bill pursuant to this section requesting forfeiture of the filing fee and deposit, the filing fee and deposit required by OAR 661-010-0015(4) shall be awarded to the governing body as cost of preparation of the record. See OAR 661-010-0030(1)."

1 reasonably possible. In our view, it is not consistent with that obligation for the petitioners  
2 to file a motion to dismiss on the day the petition for review is due that is (1) based on  
3 circumstances (absence of minutes in the record) known to petitioners at least one month  
4 prior to the deadline for filing the petition for review, and (2) expressly made *contingent* on  
5 denial of other motions that, if granted, would restart the deadline for filing the petition for  
6 review. In other words, petitioners should have either (1) filed a timely and unequivocal  
7 motion to dismiss this appeal, and thus avoided the possibility of forfeiture of the filing fee  
8 and deposit for costs, or (2) filed a request to resettle the record and restart the deadline for  
9 filing the petition for review, and risked potential forfeiture if those requests were denied.  
10 Petitioners cannot have it both ways.

11 We might feel differently, and dismiss this appeal on a different basis, if petitioners'  
12 requests to re-settle the record and restart the deadline for filing the petition for review had a  
13 more plausible basis. However, as explained, the "Notes" are clearly not written minutes of  
14 the hearings and petitioners do not claim any other basis to include them in the record.  
15 Further, petitioners do not claim that including the "Notes" in the record would assist in any  
16 way in preparing the petition for review, or explain why those notes would make any  
17 difference in this appeal. As far as we can tell, petitioners' requests had no purpose other  
18 than delay resolution of this appeal and perhaps to gain additional time to prepare the petition  
19 for review, and petitioners' contingent motion for withdraw served no purpose other than as  
20 an attempt to avoid potential forfeiture of the filing fee and deposit for costs. Accordingly,  
21 we decline to grant petitioners' contingent motion to withdraw, and instead dismiss this  
22 appeal based on failure to timely file the petition for review.

23 Because no petition for review was filed within the deadlines set out in our May 15,  
24 2007, order, or pursuant to any extension of time, this appeal must be dismissed. OAR 661-  
25 010-0030(1).

26 This appeal is dismissed.