

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WAYNE McKY,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 JOSEPHINE COUNTY,)
11)
12 Respondent.)
13

LUBA No. 98-187

ORDER

14 INTRODUCTION

15 Before the Board are the county's motion to dismiss and petitioner's motion to take
16 evidence not in the record.

17 Petitioner filed his notice of intent to appeal (NITA) with LUBA on October 23,
18 1998. The NITA gave notice that petitioner intended to appeal the county's decision entitled
19 "Matter of the Request for Tentative Plan Approval for the Sugarpine Subdivision," dated
20 May 13, 1998. The NITA also states that petitioner was entitled to notification of the
21 application and of the decision but did not receive either notice, and that petitioner obtained
22 actual notice of the decision on October 3, 1998. Further, the NITA states that on October
23 13, 1998, petitioner filed a timely appeal of the county's decision with the county planning
24 department. Attached to the NITA was petitioner's affidavit, averring that he was entitled to
25 notice of the county's decision.

26 On November 16, 1998, the Board received the record. On December 3, 1998,
27 petitioner filed a motion to take evidence not in the record, pursuant to OAR 661-010-0045,
28 to establish that petitioner was entitled to notification of the application and the county's
29 decision. Attached to petitioner's motion was the affidavit attached to his NITA, and a list of
30 Community Advisory Committees and Neighborhood Associations. Petitioner's name is
31 listed as a contact person under the Hugo Neighborhood Association. The county responded,

1 objecting to petitioner's motion to take evidence not in the record, on the grounds that
2 petitioner's motion had failed to establish any basis to take evidence in the record under the
3 criteria set forth at OAR 661-010-0045(1) and (2).

4 On January 14, 1999, petitioner informed the Board that the county had scheduled a
5 hearing on his local appeal, and requested that the Board suspend the LUBA proceedings
6 pending resolution of the local appeal. The Board suspended its proceedings.

7 On April 22, 1999, petitioner filed with LUBA by certified mail a document entitled
8 Amended Notice of Intent to Appeal (amended NITA). The amended NITA purports to
9 appeal the county's decision entitled "Appeal of the Planning Director's Decision to Approve
10 the Tentative Plan of the Sugarpine Subdivision." The amended NITA states that the
11 county's decision became final April 2, 1999, and further that the county's decision

12 "involves Respondent's denial to hear the said appeal of Petitioner, who was
13 entitled to notification, and is chairperson of a recognized and affected
14 neighborhood association that was neither provided notice of the subject land
15 use application nor notice of the decision approving said application."

16 **MOTION TO DISMISS**

17 The county responds to petitioner's filing of the amended NITA by moving to dismiss
18 that NITA on the grounds that (1) the amended NITA was not timely filed because it was
19 filed with LUBA more than 21 days after the challenged decision became final; and (2)
20 petitioner failed to pay the fee and deposit required by OAR 661-010-0015(4).

21 Petitioner argues, first, that the amended NITA was timely filed under OAR 661-010-
22 0015(1)(1)(b) because it was mailed by certified mail within 21 days of the date the decision
23 it appeals becomes final.¹ We agree. With respect to petitioner's failure to submit the fee

¹OAR 661-010-0015(1)(b) provides:

"The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the

1 and deposit required by OAR 661-010-0015(4), petitioner explains that he filed the initial
2 NITA to preserve his appeal rights at LUBA while he pursued the local appeal, and that the
3 county denied his local appeal on the grounds that he lacked standing. Petitioner states that
4 both the initial NITA and the amended NITA are "directly and fundamentally connected to
5 the county's failure to notify Petitioner" of the county's original decision. Response to
6 Respondent's Motion to Dismiss 2. Under these circumstances, petitioner argues, his right to
7 have the matter heard by LUBA should not be precluded.

8 In Ray v. Douglas County, 140 Or App 24, 914 P2d 26 (1996), the Court of Appeals
9 held that failure to pay the fee and costs required by OAR 661-010-0015(4) is not a basis to
10 dismiss an appeal, where LUBA accepted a notice of intent to appeal without ensuring that
11 petitioner made the required payment. In that circumstance, the court held, failure to pay the
12 requisite fee and costs was a technical violation of LUBA's rules, and LUBA could not
13 dismiss the appeal without affording petitioner an opportunity to make the required payment.
14 140 Or App at 29-30. In the present case, the amended NITA clearly appeals a different,
15 albeit related, decision than that appealed in the initial NITA. Consequently, petitioner is
16 required to submit the requisite fee and deposit with the amended NITA. We agree with
17 petitioner that his failure to pay those fees and costs under the present circumstances is not
18 necessarily fatal to his appeal of the county's April 2, 1999 decision, for the reasons stated in
19 Ray.

20 However, the present case is complicated by the Court of Appeals' decision in
21 Tarjoto v. Lane County, 137 Or App 305, 904 P2d 641 (1995). In that case, the Court of
22 Appeals affirmed LUBA's dismissal of an appeal where the county had made a decision
23 without a hearing under provisions implementing ORS 215.416, even though the county
24 failed to provide notice to the petitioner, who was entitled to that notice. The petitioner in
25 Tarjoto learned of the decision over a year after the decision was made and filed both a local

certified or registered number. A Notice unaccompanied by payment of the fee and deposit
required by section (4) of this rule shall not be accepted for filing." (Emphasis added).

1 appeal with the county and an appeal with LUBA. The county accepted the petitioner's local
2 appeal and conducted the appropriate proceedings. The Court of Appeals agreed with LUBA
3 under the facts of that case

4 "that there is a local remedy that is 'available' to petitioner and that the county
5 is required by state statute to permit him to pursue and complete its hearing
6 process. Consequently, he must exhaust that remedy before he may seek
7 review by LUBA." 137 Or App at 310.

8 The present case differs from Tarjoto in that it is not yet clear whether petitioner is
9 entitled to notice of the county's decision, as he avers. Petitioner's theory as to why he is
10 entitled to notice is based, apparently, on the fact that he is the contact person for the Hugo
11 Neighborhood Association. Pursuant to ORS 197.763(2)(b) and 215.416(11)(a), the county
12 must provide notice of permit decisions made without a hearing to neighborhood
13 organizations that are recognized by the local government and whose boundaries include the
14 subject property.

15 However, even if petitioner is entitled to notice of the county's decision he is still
16 subject to the requirement under ORS 197.825(2)(a) that he exhaust available local remedies.
17 Whether it was required to or not, the county has made available to petitioner a local remedy
18 that he has pursued to an ultimate conclusion. In this circumstance, the appropriate course of
19 action is to dismiss LUBA No. 98-187, because at the time petitioner filed that appeal he had
20 a local remedy that was available to him and consequently a remedy that he was required to
21 pursue. Tarjoto, 137 Or App at 310.

22 Therefore, we treat petitioner's amended NITA as a notice of intent to appeal that
23 substantially complies with the provisions of OAR 661-010-0015. Consequently, petitioner
24 has filed a timely appeal of the county's decision regarding his local appeal, albeit one that
25 lacks the requisite fee and deposit. If petitioner submits the fee and deposit required by OAR
26 661-010-0015(4) within fourteen (14) days of the date of this order, the defect in the filing of

1 the amended Notice will be cured, and the appeal of the county's decision arising from the
2 local appeal will proceed.²

3 The county's motion to dismiss the amended NITA is denied. However, on the
4 Board's own motion, LUBA No. 98-187 will be dismissed after petitioner has had an
5 opportunity to cure the defect in the filing of the amended Notice.

6 **MOTION TO TAKE EVIDENCE**

7 Because LUBA No. 98-187 will be dismissed, petitioner's motion to take evidence in
8 LUBA No. 98-187 is moot. Accordingly, that motion is denied.

9 Dated this 2nd day of June, 1999.

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Tod A. Bassham
Board Member

²Petitioner may be entitled to recover some or all of the deposit paid in LUBA No. 98-187. OAR 660-010-0075(1)(d).