

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

4 DJ BLEU, GARY JANSIK and LINDA JANSIK,  
5 *Petitioners,*  
6

7 vs.  
8

9 CLACKAMAS COUNTY,  
10 *Respondent.*  
11

12 LUBA No. 2006-108  
13

14 FINAL OPINION  
15 AND ORDER  
16

17 Appeal from Clackamas County.  
18

19 DJ Bleu, Sandy, Gary Jansik and Linda Jansik, Clackamas, represented themselves.  
20

21 Michael E. Judd, Assistant County Counsel, Oregon City, represented respondent.  
22

23 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,  
24 participated in the decision.  
25

26 DISMISSED

09/27/2006  
27

28 You are entitled to judicial review of this Order. Judicial review is governed by the  
29 provisions of ORS 197.850.

**NATURE OF DECISION**

Petitioners appeal a county hearings officer decision that denies their appeal of a planning director's determination that they do not have a nonconforming use right to maintain trucks and equipment used in an excavation and hauling business on their property.

**FACTS**

Under county zoning that was first applied to petitioners Jansiks' property in 1964, a hauling and excavation business is not allowed on their property. On September 30, 2005, petitioners Jansik, filed an application to verify that they have right to store and maintain trucks and equipment used in an excavation and hauling business on their property, as a nonconforming use that was in existence in 1964. On January 17, 2006, the county planning director denied that application, and the Jansiks appealed that decision to the county hearings officer.

The hearings officer held a public hearing on that appeal on April 6, 2006. At that hearing, petitioner Bleu advised the hearings officer that he was first contacted to assist on this application on April 5, 2006, and he requested that he be given "an extension of about 3 weeks to properly review this data." Record 51. At the conclusion of the public hearing, the hearings officer held the record open for two weeks, until April 20, 2006, for petitioners to submit additional evidence in support of the application. During the 14 days he was allowed to submit additional evidence, petitioner Bleu submitted "two aerial photographs (from 1964 and 1967), 14 pages of photographs of equipment on the site in 2006, and affidavits from Anne and Fred Wickersham, John Kitterling and Gary and Linda Jansik." Record 5. Other parties and the county were given until April 27, 2006 to respond to the new evidence from the petitioners. Petitioners were allowed until May 4, 2006 to submit final legal argument. The hearings officer issued his final decision on May 24, 2006, denying the appeal and finding that petitioners had failed to carry their burden to establish that "an excavation and

1 hauling business on the site was established before September 8, 1964.” Record 8. This  
2 appeal followed.

3 Petitioners filed their notice of intent to appeal with LUBA on June 14, 2006.  
4 Petitioner Bleu was designated lead petitioner. OAR 661-010-0015(3)(f)(A). LUBA  
5 received the county’s record in this appeal on July 7, 2006. In the certificate of service that  
6 accompanied that record, the county certified that a copy of the record had been served on  
7 petitioner Bleu by mail on July 6, 2006. On July 7, 2006, LUBA sent a letter to petitioner  
8 Bleu and the county advising the parties that the record had been received on that date and  
9 that petitioners’ petition for review was due in 21 days. Under our rules, the deadline for  
10 filing the petition for review expired on July 28, 2006, 21 days after the date LUBA received  
11 the record. OAR 661-010-0030(1).<sup>1</sup> LUBA has not received a petition for review.

12 On August 21, 2006, the county moved to dismiss this appeal for failure to file a  
13 timely petition for review.

14 **DECISION**

15 On August 16, 2006, petitioner Bleu transmitted a letter to LUBA. That letter  
16 apparently was sent in anticipation of the county’s August 21, 2006 motion to dismiss. In an  
17 order dated August 28, 2006, LUBA allowed petitioner the 14 days provided by OAR 661-  
18 010-0065(2) to file a written response to the motion to dismiss. In that order we noted that  
19 we had received petitioner Bleu’s August 16, 2006 letter and stated that “[i]f petitioners wish  
20 to rely on that August 16, 2006 letter as their response to the motion to dismiss, they may so

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

“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.”

1 advise LUBA.” We have not received a written response to the motion to dismiss, and  
2 petitioners have not advised LUBA that they wish to rely on the August 16, 2006 letter as  
3 their response. We nevertheless consider that August 16, 2006 letter.

4 **A. Failure to Receive LUBA’s July 7, 2006 Letter**

5 In the first two numbered paragraphs in his August 16, 2006 letter, petitioner Bleu  
6 objects that he did not receive LUBA’s July 7, 2006 letter advising the parties that LUBA  
7 had received the record and advising petitioners that the petition for review was due 21 days  
8 later. Petitioner Bleu claims his neighbor has the same house number and frequently  
9 receives and keeps petitioner Bleu’s mail for weeks.

10 It is petitioner Bleu’s responsibility, as lead petitioner, to provide LUBA with a  
11 reliable mailing address where documents that are filed in this appeal can be served on  
12 petitioner Bleu. LUBA’s July 7, 2006 letter and all other documents in this appeal have been  
13 mailed to petitioner Bleu at the address he provided in the notice of intent to appeal. If that is  
14 not a dependable address, it is petitioner Bleu’s responsibility to provide one that is  
15 dependable.

16 Even if LUBA’s July 7, 2006 letter was mistakenly delivered to petitioner Bleu’s  
17 neighbor, petitioner does not claim that he did not receive the copy of the record that the  
18 county served on him at the same address on July 6, 2006. Having received that copy of the  
19 record, petitioner cannot now reasonably claim that he was unaware that he was obligated to  
20 file his petition for review within the deadline established by OAR 661-010-0030(1).  
21 *Cunningham v. Josephine County*, 50 Or LUBA 58 (2005).

22 **B. The Heading of OAR 661-010-0030 is Ambiguous**

23 The heading of OAR 661-010-0030 is “Petition for Review.” In his fifth numbered  
24 paragraph, petitioner complains that the heading is ambiguous. Petitioner points out that the  
25 heading of OAR 661-010-0035 is “Respondent’s Brief,” the heading of OAR 661-010-0038

1 is “State Agency Briefs,” and the heading of OAR 661-010-0039 is “Reply Brief.” Petitioner  
2 argues OAR 660-010-0030 would be more accurate if the heading were “Petitioner’s Brief.”

3 If petitioner is arguing that the alleged ambiguity should excuse him from failing to  
4 read OAR 661-010-0030 and discovering that he needed to file a petition for review that  
5 satisfied the requirements set out in that rule not later than 21 days after the record was  
6 received by LUBA, we reject the suggestion. Had he read OAR 661-010-0030, he would  
7 have known that there was more to bringing this LUBA appeal than filing the notice of intent  
8 to appeal that he filed on June 14, 2006.

9 **C. The Notice of Intent to Appeal Should be Treated as a Petition for Review**

10 In the third and fourth paragraphs of his August 16, 2006 letter, petitioner argues that  
11 his June 14, 2006 notice of intent to appeal should be treated as his petition for review.  
12 Petitioners’ notice of intent to appeal includes assertions that petitioners believe the hearings  
13 officer in this matter was biased and prejudged this matter. In support of those assertions,  
14 petitioners complain that the hearings officer should have allowed petitioner Bleu the three  
15 weeks he requested to present additional evidence in support of the application, rather than  
16 the two weeks the hearings officer ultimately allowed. Petitioners point to statements in the  
17 hearings officer’s decision where he points out the difficult burden of proof that petitioners  
18 face. We understand petitioners to argue those statements make the hearings officer’s  
19 decision to allow only two additional weeks to submit new evidence all the more  
20 unreasonable.

21 If petitioners had requested that LUBA and the county treat the notice of intent to  
22 appeal as their petition for review *before* the deadline for filing the petition for review  
23 expired on July 28, 2006, it is possible that we might have granted that request.<sup>2</sup> However,

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<sup>2</sup> The notice of intent to appeal does not comply with many of the requirements of OAR 661-010-0030. One of the more serious shortcomings is that the notice of intent to appeal does not include assignments of error with supporting legal argument as required by OAR 661-010-0030(4)(d). That requirement serves an important function. It requires petitioners to clearly identify their legal theories and the arguments in support of

1 petitioners did not do so. Petitioners may not wait until over two weeks after the deadline for  
2 filing the petition for review expired to make that request.<sup>3</sup>

3           The deadline for filing the petition for review is strictly enforced. *Terrace Lakes*  
4 *Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff'd* 138 Or App 188, 906 P2d  
5 871 (1995); *Hutmacher v. Marion County*, 15 Or LUBA 514, 515 (1987). Because a petition  
6 for review was not filed within the time required by our rules, and petitioners did not obtain  
7 written consent to extend the time for filing the petition for review under  
8 OAR-661-010-0067(2) beyond July 28, 2006, ORS 197.830(11) and OAR 661-010-0030(1)  
9 require that we dismiss this appeal.

10           This appeal is dismissed.

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those theories so that the county can respond and LUBA can have a clear enough understanding of the parties' arguments to identify and decide the legal issues that must be decided to resolve an appeal.

<sup>3</sup> We note that even if that request had been made before July 28, 2006 and granted, the absence of assignments of error and supporting argument would almost certainly have led LUBA to a decision to affirm the hearings officer's decision. Petitioners make no attempt in their notice of intent to appeal to explain what additional evidence petitioner Bleu might have been able to produce in three weeks that he was not able to produce in the two weeks that he was given. Neither does the notice of intent to appeal make any attempt to explain why petitioners Jansik were unable to locate and present any available evidence in support of their application during the six month period that separates the September 30, 2005 application and the April 6, 2006 public hearing. Given those failures, it is hard to see how we could possibly agree with petitioners that the hearings officer's failure to grant three weeks rather than two weeks to submit additional evidence in support of the application was error or indicative of bias or prejudgment.