

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

3
4 THE STOP THE DUMP COALITION,
5 FRIENDS OF YAMHILL COUNTY,
6 WILLAMETTE VALLEY WINERIES
7 ASSOCIATION and McPHILLIPS FARM, INC.,
8 *Petitioners,*

9
10 vs.

11
12 YAMHILL COUNTY,
13 *Respondent,*

14
15 and

16
17 RIVERBEND LANDFILL COMPANY,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2014-023

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Yamhill County.

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27 William K. Kabeiseman, Portland, represented petitioners.

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29 Todd Sadlo, County Counsel, McMinnville, represented respondent.

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31 Tommy A. Brooks, Portland, represented intervenor-respondent.

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

35
36 DISMISSED 05/22/2014

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

NATURE OF THE DECISION

Petitioner appeals a county ordinance that amends Yamhill County’s Comprehensive Plan and Zoning maps to reflect a plan designation from “Commercial” and “Public” to “Agriculture Forestry Large Holding,” and, for certain tax lots, a zoning designation from “Recreation Commercial” and “Public Works Safety” to “EF-80 Exclusive Farm Use.” The ordinance also imposes a Limited Use Overlay for certain tax lots.

MOTION TO INTERVENE

Riverbend Landfill Company, Inc. moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO DISMISS

The county moves to dismiss this appeal for failure to timely file the petition for review.

The county transmitted the original record to LUBA on March 20, 2014. Petitioners filed objections to the record on April 2, 2014. On April 9, 2014, the county filed a supplemental record in response to petitioners’ record objections. On April 11, 2014, the Board issued an order stating that the supplemental record appeared to resolve all of the petitioners’ objections, and that if petitioners believed otherwise they could file a further objection within 14 days. The Board settled the record as of the date of the order. The order further stated that the petition for review was due 21 days after the date of the order, meaning the deadline for filing the petition for review was May 2, 2014. However, petitioners did not file a petition for review by May 2, 2014, or any time thereafter.

1 On May 6, 2014, the county and intervenor-respondent filed a joint
2 motion to dismiss on the grounds that petitioners failed to file the petition for
3 review within 21 days of the date that the Board settled the record, as required
4 by OAR 661-010-0030(1).¹

5 On May 8, 2014, petitioners filed an objection to the county's
6 supplemental record, 13 days past the deadline to file a record objection and six
7 days past the deadline to file the petition for review. Specifically, petitioners
8 object to the county's proposal to remove from the original record a soil map
9 found at Record 2000. Petitioners explain that their May 9, 2014 record
10 objection was untimely filed due to a staffing transition at petitioners' law firm.

11 ORS 197.830(13)(a) provides that the petition for review must be filed
12 within the time limit established by the Board's administrative rules. As noted,
13 OAR 661-010-0030(1) provides that the petition for review must be filed
14 within 21 days of the date the record is received or settled, and failure to timely
15 file the petition for review shall result in dismissal of the appeal. The deadline
16 for filing the petition for review is strictly enforced, and failure to comply will
17 result in dismissal of the appeal. *Terrace Lakes Homeowners Assoc. v. City of*
18 *Salem*, 29 Or LUBA 532, *aff'd* 138 Or App 188, 906 P2d 871 (1995). In their

¹ OAR 661-010-0030(1) provides, in part:

“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). * * * 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 661-010-0067(2), shall result in dismissal of the appeal * * *.”

1 objection and response to the motion to dismiss, petitioners advance two
2 arguments to avoid dismissal of this appeal.

3 First, petitioners argue pursuant to OAR 661-010-0026(6) that the filing
4 of the supplemental record objection, even though untimely, automatically
5 suspended all other time limits, including the May 2, 2014 deadline to file the
6 petition for review.² Further, petitioners contend that the failure to file a timely
7 record objection was a “technical violation” of LUBA’s rules that need not
8 interfere with the Board’s review, absent prejudice to other parties’ substantial
9 rights. OAR 661-010-0005.³

² OAR 661-010-0026(6) provides:

“If an objection to the record is filed, the time limits for all further procedures under these rules shall be suspended. When the objection is resolved, the Board shall issue an order declaring the record settled and setting forth the schedule for subsequent events. Unless otherwise provided by the Board, the date of the Board’s order shall be deemed the date of receipt of the record for purposes of computing subsequent time limits.”

³ OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under 661-010-0030(1) is not a technical violation.”

1 LUBA has held that a late filed record objection nonetheless operates to
2 suspend future deadlines in the review proceeding. *Cole v. Columbia County*,
3 28 Or LUBA 62, 66 (1994). However, a record objection filed *after* the
4 deadline for filing the petition for review has expired does not and cannot
5 “suspend” or more accurately revive that expired deadline. *Landwatch Lane*
6 *County v. Lane County*, 34 Or LUBA 348, 350 (1998).

7 As to OAR 661-010-0005, petitioners’ failure to file a timely record
8 objection might in itself be viewed as a “technical violation” of OAR 661-010-
9 0025(2) (requiring record objections to be filed within 14 days of the date the
10 record is received or settled), but OAR 661-010-0005 cannot operate to revive
11 the expired deadline to file the petition for review. The last sentence in OAR
12 661-010-0005 provides that failure to comply with the time limit for filing a
13 petition for review is not a technical violation. This sentence, read together
14 with the strict deadline to file the petition for review at OAR 661-010-0030(1),
15 makes it clear that the “technical violation” rule in OAR 661-010-0005 cannot
16 be applied in the manner petitioners propose.

17 Petitioners next argue that the OAR 661-010-0030(1) mandate that the
18 appeal must be dismissed if the petition for review is not timely filed is
19 inconsistent with ORS 197.805, which states the legislative policies that (1)
20 “time is of the essence” in reaching final land use decisions, and that (2) such
21 decisions be made consistently with “sound principles governing judicial
22 review.”⁴ Petitioners contend that OAR 661-010-0030(1) is not consistent with

⁴ ORS 197.805 states:

“It is the policy of the Legislative Assembly that time is of the
essence in reaching final decisions in matters involving land use

1 sound principles of judicial review, because dismissing an appeal for failure to
2 timely file the petition for review effectively denies petitioners their day in
3 court.

4 The Board rejected a similar argument in *Rookard v. Lane County*, 41 Or
5 LUBA 14, 19 (2001), *aff'd* 179 Or App 551, 42 P3d 949 (2002), concluding
6 that the strict deadline in OAR 661-010-0030(1) implements the ORS 197.805
7 policy that “time is of the essence” in land use matters. ORS 197.830(13)(a)
8 authorizes LUBA to “adopt rules establishing deadlines for filing petitions and
9 briefs * * *.” LUBA did so in part by adopting OAR 661-010-0030(1).
10 Petitioners have not established that the strict deadline for filing the petition for
11 review is inconsistent with “sound principles of judicial review.” We note in
12 this respect that Oregon Rules of Appellate Procedure (ORAP) 4.66(1)(a)
13 imposes a similar strict deadline regarding filing of the opening brief in appeals
14 of LUBA decisions to the Court of Appeals, and requires automatic dismissal
15 of the appeal if the opening brief is not timely filed.

16 The county’s motion to dismiss is granted.

17 The appeal is dismissed.⁵

and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting [this statute] to 197.855 to accomplish these objectives.”

⁵ Petitioners’ objection to the supplemental record is denied, as moot.