

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

3
4 CHAPMAN AND CHAPMAN LLC,
5 *Petitioner,*

6
7 vs.

8
9 COOS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2016-011

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from Coos County.

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19 Dan G. McKinney, Roseburg, represented petitioner.

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21 Keith A. Leitz, County Counsel, Coquille, represented respondent.

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

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26 DISMISSED 03/10/2016

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

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NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners upholding a planning director determination of violation of the county’s land use and development ordinance.

MOTION TO DISMISS

The county moves to dismiss this appeal as untimely filed. The county issued its decision in this matter on January 5, 2016, and it was final on that date. Under OAR 661-010-0015(1)(a), the notice of intent to appeal (NITA) must be filed with LUBA within 21 days of the date the decision became final. In the present case, the appeal deadline therefore was January 26, 2016.

OAR 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, the date of the receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number is the date of filing.”

In its response to the motion to dismiss, petitioner states that it delivered the NITA to an overnight delivery service, FedEx, on January 27, 2016.¹ LUBA

¹ In the certificate of service and filing that is attached to the NITA, petitioner’s attorney certifies that he filed the NITA “by first class mail” on January 26, 2016.

1 received the NITA on January 28, 2016.² Because petitioner did not mail the
2 NITA to LUBA by certified mail through the United States Postal Service, the
3 date of filing the NITA with LUBA is the date the NITA was received, January
4 28, 2016.

5 Petitioner responds by quoting only a portion of OAR 661-010-0005,
6 which provides in relevant part:

7 “Technical violations not affecting the substantial rights of parties
8 shall not interfere with the review of a land use decision or limited
9 land use decision. *Failure to comply with the time limit for filing a*
10 *notice of intent to appeal under OAR 661-010-0015(1) or a*
11 *petition for review under OAR 661-010-0030(1) is not a technical*
12 *violation.” (Emphasis added.)*

13 Petitioner argues that its filing of the NITA using an overnight delivery service
14 is identical in substance to filing the NITA by certified mail because the
15 services provided (delivery tracking and confirmation) are the same for
16 certified mail and overnight delivery services. Petitioner argues that the filing
17 of the NITA through an overnight delivery service is therefore a “technical
18 violation” of OAR 661-010-0015.

² Since May, 2013, OAR 661-010-0075(9) has provided that LUBA’s address is “775 Summer Street NE, Suite 330, Salem Oregon, 97301-1283.” LUBA’s address is also posted on the agency website at http://www.oregon.gov/LUBA/Pages/contact_us.aspx. On January 28, 2016, FedEx initially attempted to deliver the NITA to LUBA’s former address at 550 Capitol Street NE, Suite 235, Salem, Oregon, 97301-2552, which was the address listed in the Notice of Decision for any party to contact LUBA in writing for information about the appeal process. Motion to Dismiss Exhibit A, page 1. FedEx delivered the NITA to the correct address on January 28, 2016.

1 We reject petitioner’s argument. First, petitioner’s argument is
2 inconsistent with the express language of OAR 661-010-0015. The rule
3 provides that the date of filing of a NITA that is filed by a method other than
4 “registered or certified mail” is the date the NITA is received by the Board.
5 Filing a NITA through an overnight delivery service is therefore filing the
6 NITA by a method other than “registered or certified mail,” and the date of
7 filing is the date the NITA is received, in this case, January 28, 2016. Second,
8 petitioner’s argument is inconsistent with the last sentence of OAR 661-010-
9 0005, which specifically provides that failure to comply with the time limit for
10 filing a NITA is not a technical violation.

11 Because the NITA was filed with LUBA more than 21 days from the
12 date the city’s decision became final, this appeal was untimely filed. *McKnight*
13 *v. City of Portland*, 48 Or LUBA 292, 294-95 (2004); *Larner v. City of*
14 *Portland*, 41 Or LUBA 471, 473 (2002).

15 Accordingly, the appeal is dismissed.