

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

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3 ROY HEARNE,)
4 Petitioner,) LUBA No. 87-030
5 vs.) ORDER DENYING
6 BAKER COUNTY,) MOTION TO DISMISS
7 Respondent.)

8 Respondent Dunn has filed a motion to dismiss alleging
9 petitioner failed to file a petition within the time required
10 by Board rules and governing statutes. The record was first
11 filed in this case on May 1, 1987. Respondent contends that
12 because no petition for review was filed, this case must be
13 dismissed. OAR 661-10-30(1).

14 A notice of intent to appeal was filed in this case on
15 April 21, 1987. The county transmitted the record to the Board
16 on May 1, 1987, but did not at that time serve a copy of the
17 record on petitioner, as required by OAR 661-10-025(1)(a)(B).
18 During a conference with the parties on May 6, 1987, the county
19 agreed to serve a copy of the record on petitioner and the
20 parties agreed that the briefing schedule would be adjusted
21 accordingly.¹ A copy of the record was received by
22 petitioner on May 12, 1987. In a letter dated May 13, 1987,
23 the Board advised the parties that the briefing schedule would
24 be recalculated. The parties were advised by the Board that
25 the petition for review was due twenty-one days after receipt
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1 of the record and that the record was received on May 12, 1987.

2 Respondent Dunn correctly points out that the Board
3 actually received the record on May 1, 1987 and that the time
4 for filing a petition for review is measured from the date the
5 record is received by the Board or the date the record is
6 settled pursuant to OAR 661-10-025(3). OAR 661-10-030(1).
7 However, OAR 661-10-025(2)(a)(B) requires that the governing
8 body serve a copy of the record on the petitioner at the same
9 time it transmits the record to the Board. Here, the county
10 failed to serve the petitioner at the time the record was
11 transmitted to the Board and the petitioner did not receive a
12 copy of the record until May 12, 1987. A party cannot exercise
13 his or her rights under OAR 661-10-025(3) to require
14 appropriate supplementation or correction of the record if the
15 record has not been served on the petitioner. We conclude that
16 the date of receipt of the record for purposes of computing
17 time limits is May 12, 1987, as the parties were advised in the
18 Board's May 13, 1987 letter.²

19 Since we conclude that the record was received on May 12,
20 1987, for the purposes of computing subsequent deadlines, the
21 petition for review therefore would be due twenty-one days
22 later, or June 2, 1987. However, petitioner filed an objection
23 to the record on May 26, 1987. OAR 661-10-025(3)(b) requires
24 that objections to the record be filed within ten days
25 following service of the record on the person filing the
26 objection. Since the record was served on petitioner on May

1 12, 1987, petitioner's objection to the record was four days
2 late. Respondent Dunn contends that petitioner's failure to
3 file a timely objection means that the time for filing the
4 petition for review was not suspended as it otherwise would
5 have been under OAR 661-10-025(3)(e). Respondent Dunn further
6 contends that since petitioner did not file his petition for
7 review before June 2, 1987 this appeal must be dismissed. OAR
8 661-10-030(1).

9 The long history of Respondent Dunn's attempts to secure a
10 partition and conditional use approval for the property at
11 issue in this appeal is detailed in his affidavit. This Board
12 is not empowered to take into account the motives petitioner
13 may have had in filing this appeal. The long history of this
14 case notwithstanding, we find the delay of four days in filing
15 the objection an insufficient basis for dismissing the
16 objection to the record. OAR 661-10-005 ("...Technical
17 violations of these rules not affecting substantial rights or
18 interests of parties or of the public shall not interfere with
19 the review of a petition.").

20 The filing of the May 26, 1987 objection to the record
21 suspended the time for filing the petition for review until the
22 record is settled. OAR 661-10-025(3)(e). The record
23 objections are addressed in a separate order issued this date.

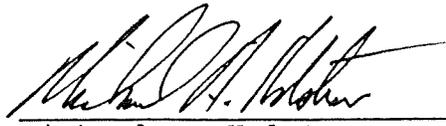
24 The motion to dismiss is denied.

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Dated this 9th day of July, 1987.

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Michael A. Holstun
Referee

FOOTNOTES

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Respondent Dunn's notice of intent to participate was not received by the Board until May 7, 1987 and Respondent Dunn did not participate in the May 6, 1987 conference.

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We note that while the county first filed the record with the Board on May 1, 1987, the notice of intent to appeal was filed on April 21, 1987 and the county was therefore not required to file the record until May 12, 1987.