

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 AL WARREN and BOB HART,
5 *Petitioners,*

6
7 vs.

8
9 JOSEPHINE COUNTY,
10 *Respondent,*

11
12 and

13
14 NINA HORSLEY,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2012-028

18 ORDER

19 ORS 197.830(11) requires that a petition for review be filed within the deadlines
20 established by LUBA’s rules. OAR 661-010-0030(1) provides, in relevant part:

21 “The petition for review together with four copies shall be filed with the
22 Board within 21 days after the date the record is received or settled by the
23 Board. * * * Failure to file a petition for review within the time required by
24 this section, and any extensions of that time under OAR 661-010-0045(9) or
25 OAR 661-010-0067(2), shall result in dismissal of the appeal.”

26 In some circumstances LUBA will overlook technical violations of its rules, including
27 violations of some filing deadlines, where the substantial rights of the parties are not
28 prejudiced. OAR 661-010-0005. However, “[f]ailure to comply with the time limit for filing
29 * * * a petition for review under [OAR] 661-010-0030(1) is not a technical violation.” *Id.*
30 The deadline for filing the petition for review is strictly enforced. *Terrace Lakes*
31 *Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff’d* 138 Or App 188, 906 P2d
32 871 (1995); *Hutmacher v. Marion County*, 15 Or LUBA 514, 515 (1987).

33 Pursuant to an October 17, 2012 order, LUBA established a deadline of November 7,
34 2012 to file the petition for review. The deadline for filing the petition for review is also the

1 deadline for filing a cross petition for review. OAR 661-010-0030(7). Therefore, November
2 7, 2012 was also the deadline for filing the cross petition for review in this appeal. OAR
3 661-010-0030(7). Petitioner’s petition for review was timely filed.

4 Intervenor-Respondent’s cross petition for review was filed by first class mail. The
5 mailing envelope arrived at LUBA on November 13, 2012 with a post mark of November 8,
6 2012. Under OAR 661-010-0075(2)(a)(B)(ii), the cross petition for review was filed at least
7 one day after the November 7, 2012 deadline expired.¹ Petitioner Hart moves to strike the
8 cross petition for review as untimely filed.

9 Because the cross petition for review is the functional equivalent of a petition for
10 review, OAR 661-010-0030(7) imposes the same filing deadline that applies to petitions for
11 review, and LUBA strictly enforces that filing deadline for cross petitions for review in the
12 same way it strictly enforces that filing deadline for the petition for review. According to
13 intervenor-respondent, the late filing of the cross petition for review was caused by her late
14 arrival at the post office on November 7, 2012, at a time when it was not possible for her to
15 secure a November 7, 2012 postmark, as would be required to rely on the date of mailing as
16 the date of filing. *See* n 1. Intervenor-respondent explains her failure to arrive at the post
17 office in time to comply with the November 7, 2012 filing deadline by explaining that she
18 had an automobile accident in which her car was “side swiped” eight days earlier, on October
19 28, 2012, and because she has what she characterizes as a “disability.” Intervenor-respondent
20 does not specify the nature of that disability, and intervenor-respondent’s explanation falls far
21 short of establishing that her unspecified disability and the automobile accident eight days
22 earlier were actually the cause of her failure to comply with the November 7, 2012 filing
23 deadline.

¹ OAR 661-010-0075(2)(a)(B)(ii) provides, in part:

“If the date of mailing is relied upon as the date of filing, the date of the first class postmark on the envelope mailed to the Board is the date of filing.”

1 Petitioner Hart’s motion to strike the cross petition for review is granted.

2 In a November 16, 2012 order we suspended the briefing deadline pending our
3 resolution of the motion to strike. We now establish a new briefing schedule. The deadline
4 for respondent and intervenor-respondent to file their response briefs shall be 21 days from
5 the date of this order. The deadline for the Board to issue its final opinion and order shall be
6 56 days from the date of this order

7 Dated this 29th day of November, 2012.

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Michael A. Holstun
Board Member