

Opinion by Holstun.

MOTION TO DISMISS

The decision of the Clackamas County Hearings Officer challenged in this proceeding was mailed to petitioner on November 7, 1989.¹ Twenty-one days later, on November 28, 1989, petitioner mailed its notice of intent to appeal to LUBA by certified mail. The notice of intent to appeal was received by LUBA two days later, on November 30, 1989.²

Respondent moves to dismiss alleging that the notice of intent to appeal was not timely filed because the notice of intent to appeal was not received by LUBA until 23 days after the decision, not within 21 days as required by statute and LUBA rules.

Petitioner argues the county's decision became final on December 8, 1989. Citing Weyerhaeuser Company v. Miller, 306 Or 1, 760 P2d 1317 (1988), petitioner contends that its notice of intent to appeal was timely filed "for it was mailed certified postage pre-paid properly addressed within twenty one (21) days after the date the land use decision was final." Petitioner's Memorandum in Opposition to Motion

¹According to the certificate of mailing attached to the challenged decision, the decision was mailed to petitioner on November 7, 1989. In an affidavit attached to respondent's motion to dismiss, the hearings officer explains that although the transmittal envelope received by petitioner was postmarked November 8, 1989, the decision was in fact "placed in the mail box at the West Linn, Oregon Post Office at approximately 11:00 PM on November 7, 1989." Affidavit of Richard F. Crist.

²The notice of intent to appeal was received by the Department of General Services on November 30, 1989 and delivered to LUBA the same day.

to Dismiss 2.

This Board has held on numerous occasions that failure to file the notice of intent to appeal within the time limits prescribed by statute and our rules will result in dismissal of the appeal. Karlin v. City of Portland, 13 Or LUBA 21 (1985); McCoy v. Marion County, 9 Or LUBA 214 (1983); Berg v. Coos County, 7 Or LUBA 428 (1983). ORS 197.830(8) provides in relevant part:

"A notice of intent to appeal a land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. * * *."

Our rule governing notices of intent to appeal similarly provides:

"* * * The Notice * * * shall be filed with the Board as provided in OAR 661-10-075(2)(a) on or before the 21st day after the date the decision sought to be reviewed becomes final. * * * A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed. * * *"
OAR 661-10-015(1).

If petitioner's notice of appeal was filed on November 28, 1989 when it was mailed to the Board, then the notice of appeal was timely filed regardless of whether the county's decision became final on November 7 or November 8, 1989. However, if the notice of appeal was not filed until the notice of appeal was received by LUBA on November 30, 1989, then the notice of appeal was not timely filed even if the decision became final on November 8, 1989.

OAR 661-10-075(2) specifies how filing of documents

with LUBA is to be accomplished:

"(a) Filing of Notice of Intent to Appeal: Filing of a Notice of Intent to Appeal with the Board is accomplished by delivery of the Notice to the Board, or receipt of the Notice by the Board * * * on or before the date due.

"(b) Filing of Other Documents: With the exception of the Notice of Intent to Appeal, filing a document with the Board is accomplished by:

"(A) Delivery to the Board on or before the date due; or

"(B) Mailing on or before the date due by first class mail with the United States Postal Service.

" * * * * * "

As OAR 661-10-075(2) makes clear, although all other documents are considered filed when delivered or when mailed to LUBA, a notice of intent to appeal is not filed until it is delivered to or received by LUBA.³ A notice of intent to

³Although it is not important in this case because the notice of intent to appeal was received by the Department of General Services and LUBA on the same date, it is the date LUBA receives the notice of intent to appeal that is critical, not the date the notice of intent to appeal is received by the Department of General Services. See Karlin v. City of Portland, supra. During a conference call concerning this motion, petitioner speculated the notice of intent to appeal might have arrived at LUBA more quickly had it been directed by the Salem Post Office directly to LUBA rather than to the Department of General Services. Petitioner provides no basis for such speculation, and, even if such were the case, it would provide no basis for overlooking the clear requirement of OAR 661-10-075(2) that the notice of intent to appeal be delivered to or received by LUBA within 21 days after the decision becomes final.

We note that our requirement that the notice of intent to appeal actually be delivered to or received by LUBA, rather than be mailed within 21 days, gives all parties certainty there will not be a LUBA appeal if the notice of intent to appeal is not actually received by LUBA within the 21

appeal mailed to LUBA within the 21 day time limit but received by LUBA after the 21 day time limit has expired, is not timely filed. Karlin v. City of Portland, supra.

Weyerhaeuser Company v. Miller, supra, cited by petitioner, is of no assistance to petitioner in this case. That case concerned a Workers' Compensation Board rule requiring a particular manner of proof of the date of mailing of requests for review. Although that case and most of the statutes cited in the opinion specifically allowed filing to be effective upon mailing, OAR 661-10-075(2) specifically provides that the date of receipt by LUBA of the notice of intent to appeal, not the date of mailing, is the date the notice of intent to appeal is filed.⁴ Petitioner does not contend that the Board lacks statutory authority to adopt a rule specifying the manner in which

day deadline. Otherwise, the uncertainty that always attends mail or other methods of delivery of documents would extend uncertainty regarding the possibility of a LUBA appeal beyond the 21 day deadline.

⁴Petitioner incorrectly suggests that ORS 174.120 and Oregon Rule of Civil Procedure (ORCP) 10 override the requirements stated in OAR 661-10-075(2). Computing time by excluding the first day and counting the final day as required by ORS 174.120 is also required by our rules, OAR 661-10-075(7). Computing the time limit in this manner, the notice of intent to appeal in this case was due November 28 or 29, 1989, depending on whether the county's decision became final on November 7 or 8, as explained above in the text. ORCP 10(C), which allows three additional days to respond in civil proceedings where a "notice or paper is served by mail does not have the effect of extending the period of time for filing a notice of intent to appeal to LUBA for three days when notice of the local government land use decision is provided by mail. Although this Board does on occasion refer to the Oregon Rules of Civil Procedure when our rules do not address procedural issues, Rule 1(A) makes it clear that the rules are binding on "circuit and district courts," not on state agencies such as LUBA. The time for filing a notice of intent to appeal with LUBA is governed by OAR 661-10-075(2).

notices of intent to appeal must be filed. See ORS 197.820(4) (LUBA authorized to adopt rules governing its review proceedings).

The notice of intent to appeal in this case was not received by LUBA until November 30, 1989, and, therefore, under 661-10-015(1) and OAR 661-10-075(2) was not timely filed. OAR 661-10-005 provides that the Board may overlook technical violations of our rules "not affecting the substantial rights of parties * * *." However, that rule also provides that failure to file the notice of intent to appeal within the time limits specified by OAR 661-10-015(1) is not viewed by the Board as a technical violation. Because the notice of intent to appeal was not filed within 21 days after the county's decision became final, this appeal must be dismissed. OAR 661-10-015(1).