

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 TERRACE LAKES HOMEOWNERS)
5 ASSOCIATION, DIANNE SCHOENING,)
6 DANIEL H. PENN and DONALD SANDERS,)
7)
8 Petitioners,)
9)
10 vs.)
11) LUBA No. 95-037
12 CITY OF SALEM,)
13) FINAL OPINION
14 Respondent,) AND ORDER
15)
16 and)
17)
18 ROBINS LANE LIMITED PARTNERSHIP,)
19)
20 Intervenor-Respondent.)

23 Appeal from City of Salem.

25 Daniel Kearns, Portland, represented petitioners.

27 Paul A. Lee, Assistant City Attorney, Salem,
28 represented respondent.

30 Kris Jon Gorsuch, Salem, represented intervenor-
31 respondent.

LIVINGSTON, Chief Referee; HANNA, Referee; GUSTAFSON, Referee, participated in the decision.

35
36 DISMISSED 08/25/95

37 You are entitled to judicial review
38

38 You are entitled to judicial review of this order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Livingston.

2 **FACTS**

3 Petitioners appeal the city's approval of a driveway
4 variance. After the city filed the record on March 21,
5 1995, petitioners filed objections to the record. We
6 entered an order resolving these objections on June 29, 1995
7 The order required the city to file a supplemental record.
8 On July 5, 1995, the city hand-delivered the supplemental
9 record to LUBA and mailed a copy of the supplemental record
10 to petitioners.

11 On July 7, 1995, we mailed a letter to the parties,
12 which stated: "The petition for review is due twenty-one
13 days after receipt of the supplement. * * * The
14 supplemental record was received on July 5, 1995."
15 Petitioners' attorney received the supplemental record on
16 July 7, 1995 and our July 7, 1995 letter on July 9, 1995.
17 Petitioners filed their petition for review on July 28,
18 1995, twenty-three days after LUBA received the supplemental
19 record.

20 **MOTION TO DISMISS**

21 Respondents move to dismiss this appeal on the ground
22 the petition for review was untimely filed. ORS 197.830(10)
23 states that a petition for review shall be filed within the
24 deadlines established by Board rule under ORS 197.830(12).
25 The Board's rule, stated at OAR 661-10-030(1), provides, in
26 relevant part:

1 " * * * The petition for review shall be filed with
2 the Board within 21 days after the date the record
3 is received by the Board. * * * Failure to file a
4 petition for review within the time required by
5 this section, and any extensions of that time
6 under * * * OAR 661-10-067(2), shall result in
7 dismissal of the appeal and forfeiture of the
8 filng fee and costs to the governing body."
9 (Emphasis added.)

10 OAR 661-10-067(2) provides that the time limit for filing
11 the petition for review may be extended only with the
12 written consent of all parties.

13 Petitioners contend OAR 661-10-025(3) requires that a
14 petitioner receive the supplemental record on the same day
15 as LUBA. Petitioners contend, in the alternative, that the
16 petition for review should be due twenty-one days after the
17 supplemental record is received by a petitioner.

18 OAR 661-10-025 provides, in relevant part:

19 "(2) Transmittal of Record: The governing body
20 shall, within 21 days after service of the
21 Notice on the governing body, transmit to the
22 Board the original or a certified copy of the
23 record of the proceeding under review. * * *
24 Transmittal of the record is accomplished by
25 delivery of the record to the Board, or by
26 receipt of the record by the Board, on or
27 before the due date.

28 "(3) Service of Record: Contemporaneously with
29 transmittal, the governing body shall serve a
30 copy of the record * * * on the petitioner or
31 the lead petitioner, if one is
32 designated. * * *"

33 OAR 661-10-025 thus distinguishes between transmittal
34 of the record, which requires actual delivery to LUBA, and
35 service of the record on a petitioner. Our rules allow

1 service in person or by first-class mail. Mail service is
2 complete on deposit in the mail. OAR 661-10-075(2)(b)(B).
3 The rules do not distinguish between personal or mail
4 service for purposes of determining when a copy of the
5 record is served on a petitioner, as required by
6 OAR 661-10-025.

7 Petitioners argue that special circumstances -- the
8 different methods of service and the fact that LUBA's letter
9 notifying the parties the record had been received was
10 mailed two days after the actual date of receipt -- justify
11 an exception under the line of reasoning found in Hearne v.
12 Baker County, 15 Or LUBA 635 (1987), and Benjamin v. City of
13 Ashland, 19 Or LUBA 600 (1990). In both Hearne and
14 Benjamin, a record objection was filed after the 10-day
15 period allowed by OAR 661-10-026(2). That raised the
16 question of whether the objection had the effect of
17 suspending the time for filing the petition for review under
18 ORS 197.830(14) and OAR 661-10-030(1).

19 We found in Hearne that the county's failure to serve
20 the petitioner with a copy of the record justified a delay
21 in filing objections, since the petitioner could not
22 exercise his right to file objections without seeing the
23 record. Hearne, 15 Or LUBA at 636. Similar circumstances
24 were present in Benjamin. In both cases, once we determined
25 the record objections were timely, we concluded the petition
26 for review was timely.

1 The facts are different here. The city did not fail to
2 serve the record on petitioners on the same day as it filed
3 the record with LUBA. Service of the record on petitioners
4 was by a method allowed by our rules. Our letter expressly
5 stated when the record had been received by LUBA.

6 The deadline for filing a petition for review is
7 strictly enforced. See Bongiovanni v. Josephine County, 29
8 Or LUBA ___, (LUBA No. 95-062, June 21, 1995); McCauley v.
9 Jackson County, 20 Or LUBA 176 (1990); Piquette v. City of
10 Springfield, 16 Or LUBA 47 (1987); Hutmacher v. Marion
11 County, 15 Or LUBA 514 (1987). Petitioners did not file
12 their petition for review within twenty-one days after the
13 record was settled.

14 This appeal is dismissed.