

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

3
4 TOM PILLING,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CROOK COUNTY,) LUBA No. 92-040
11)
12 Respondent,) FINAL OPINION
13) AND ORDER
14 and)
15)
16 ROBERT L. COATS, and)
17 JOYCE E. COATS,)
18)
19 Intervenors-Respondent.)

20
21
22 Appeal from Crook County.

23
24 Tom Pilling, Terrebonne, represented himself.

25
26 Thomas N. Corr, Prineville, represented respondent.

27
28 Frank M. Parisi, Portland, represented intervenors-
29 respondent.

30
31 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
32 Referee, participated in the decision.

33
34 DISMISSED 03/17/92

35
36 You are entitled to judicial review of this Order.
37 Judicial review is governed by the provisions of ORS
38 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner challenges a Crook County order approving a
4 mining permit in an exclusive farm use zone.

5 **MOTION TO INTERVENE**

6 Robert L. Coats and Joyce E. Coats, the applicants
7 below, move to intervene on the side of respondent in this
8 proceeding on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 On January 30, 1992, the Crook County Court signed an
12 order approving a mining permit with conditions. The order
13 was filed with the Crook County Clerk on the same date.

14 On February 24, 1992, this Board received in the mail a
15 check in the amount of \$200 from petitioner. The check was
16 accompanied by the following note signed by petitioner,
17 dated February 21, 1992:

18 "This check is to cover the application by myself,
19 Tom Pilling, against the Crook County Court which
20 I mailed today under separate cover.

21 "The check was inadvertently omitted from the
22 application envelope. Sorry for the mix up."

23 On February 25, 1992, the Board received in the mail a
24 document entitled "NOTICE OF INTENT TO APPEAL" signed by
25 petitioner. This document identifies the respondent as
26 "county Court of the State of Oregon for Crook County" and
27 describes the decision appealed as "that land use decision

1 of respondent entitled 'Application by Robert L. Coats and
2 Joyce E. Coats for issuance of a Mining Permit * * *,' which
3 became final on February 3, 1992." Notice of Intent to
4 Appeal 1.

5 **MOTION TO DISMISS**

6 Intervenor-respondent (intervenors) move that this
7 appeal be dismissed because the notice of intent to appeal
8 was not timely filed. Intervenor argue that pursuant to
9 ORS 197.830(8) and OAR 661-10-015(1), this Board is required
10 to dismiss the appeal because the notice of intent to appeal
11 was not filed on or before the 21st day after the decision
12 sought to be appealed became final.

13 Intervenor contend that under OAR 661-10-010(3), the
14 county order petitioner seeks to challenge became final on
15 January 30, 1992, when it was signed by the decision makers
16 and, therefore, the notice of intent to appeal was required
17 to be filed on or before February 20, 1992. Intervenor
18 further contend that even if the order did become final on
19 February 3, 1992, as stated in the notice of intent to
20 appeal, the notice of intent to appeal was required to be
21 filed on or before February 24, 1992.¹ Intervenor argue it

¹In a memorandum supporting intervenors' motion to dismiss, the county argues the challenged decision approves a "permit," as defined in ORS 215.402(4). The county attaches to its memorandum a copy of the notice of the challenged decision that was mailed to petitioner, dated February 3, 1992, and an affidavit of the county planning director stating that the notice was in fact mailed to petitioner on February 3, 1992. The county therefore argues that under League of Women Voters v. Coos County, 82

1 is well established that a notice of intent to appeal is not
2 "filed" until it is received by this Board. Karlin v. City
3 of Portland, 13 Or LUBA 21, 23 (1985); see also Hoffman v.
4 City of Portland, 7 Or LUBA 213, 217-18 (1983). Intervenors
5 contend the notice of intent to appeal was in fact received
6 by the Board and, therefore, "filed" on February 25, 1992.

7 Petitioner concedes his Notice of Intent to Appeal
8 document was not received by the Board until February 25,
9 1992. However, petitioner contends his appeal was timely
10 filed because his \$200 check and accompanying letter were
11 received by the Board on February 24, 1992. According to
12 petitioner, during a telephone conversation on March 10,
13 1992, the Board's administrative assistant informed him that
14 this "should qualify [his] application as timely." Motion
15 to Deny Dismissal of Appeal 1.

16 ORS 197.830(8) provides in relevant part:

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

21 OAR 661-10-015(1) provides in relevant part:

22 "* * * The Notice [of Intent to Appeal], together
23 with the filing fee and deposit for costs required
24 by subsection (4) of this rule, shall be filed
25 with the Board as provided in OAR 661-10-075(2)(a)
26 on or before the 21st day after the date the
27 decision sought to be reviewed becomes final
28 * * *. A Notice filed thereafter shall not be

Or App 673, 681, 729 P2d 588 (1986), the challenged decision became final
for the purposes of petitioner appealing to this Board on February 3, 1992.

1 deemed timely filed, and the appeal shall be
2 dismissed. * * * (Emphasis added.)

3 OAR 661-10-075(2)(a) provides:

4 " * * * Filing of a Notice of Intent to Appeal with
5 the Board is accomplished by delivery of the
6 Notice to the Board, or receipt of the Notice by
7 the Board, accompanied by payment of the filing
8 fee and deposit required by OAR 661-10-015(4)
9 * * *."

10 Under the above quoted statutory and rule provisions, an
11 appeal must be dismissed if the notice of intent to appeal
12 is not delivered to or received by the Board on or before
13 the 21st day after the decision sought to be reviewed became
14 final. Oak Lodge Water District v. Clackamas County, 18
15 Or LUBA 643, 645-46 (1990); Karlin v. City of Portland,
16 supra.

17 In this case, the letter received by the Board on
18 February 24, 1992 is not itself a notice of intent to
19 appeal, but rather states that petitioner's notice of intent
20 to appeal was mailed separately. The notice of intent to
21 appeal was received by the Board on February 25, 1992 and,
22 therefore, was "filed" on that date.

23 We need not determine whether the county order
24 petitioner seeks to appeal became final on January 30, 1992,
25 as contended by intervenors, or on February 3, 1992, as
26 contended by petitioner and the county. Because the notice
27 of intent to appeal was not filed on or before the 21st day
28 after either date, it was not timely filed. Furthermore,
29 whether a member of the Board's staff erroneously advised

1 petitioner on March 10, 1992 that his notice of intent to
2 appeal was timely filed makes no difference. The alleged
3 advice was almost two weeks after the notice of intent to
4 appeal was untimely filed.²

5 The motion to dismiss is granted.

6 This appeal is dismissed.

²We also note that failure to comply with a statutory time limit is not excused because of "a clerk's error in responding to a telephone inquiry." Columbia River Television v. Multnomah Co., 299 Or 325, 329, 702 P2d 1065 (1985); see Far West Landscaping v. Modern Merchandising, 287 Or 653, 601 P2d 1237 (1979).