

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BERNADINE WYNNYK,
5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11 and

12
13 CITY OF JACKSONVILLE,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2000-268

17
18 FINAL OPINION
19 AND ORDER

20
21 Appeal from Jackson County.

22
23 Bob Robertson, Medford, represented petitioner.

24
25 Michael Jewett, Medford, represented respondent.

26
27 Kurt H. Knudsen, Ashland, represented intervenor-respondent.

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30 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
31 participated in the decision.

32
33 DISMISSED

03/02/2001

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

37

Holstun, Board Member.

FACTS

A. Initial Notice of Intent to Appeal

The decision that petitioner challenges in this appeal became final on December 6, 2000.¹ Petitioner first attempted to file a notice of intent to appeal (NITA) in this appeal 21 days later, on December 27, 2000. That NITA was sent to LUBA by express mail on December 21, 2000, but was mailed to LUBA’s former address at the State Library Building rather than its current address at the Public Utility Commission Building. LUBA received that NITA on December 27, 2000.² Because the NITA did not include the filing fee and deposit for costs required by OAR 661-010-0015(4), it was not accepted by LUBA.³ On December 27, 2000, LUBA administrative staff placed a telephone call to petitioner’s attorney at the phone number listed in the NITA and left a phone message that the NITA could not be accepted without the required filing fee and deposit for costs. The phone number listed in the NITA was not correct, and petitioner’s attorney was not told until December 28, 2000, that the NITA could not be accepted without the required filing fee and deposit for costs. LUBA administrative staff returned the original NITA to petitioner by mail on December 28, 2000. Record 7.

¹No party disputes that the challenged decision was final for purposes of appeal on this date. The copy of the decision that is included in the record is dated December 6, 2000, and indicates it was mailed to petitioner’s attorney on that date. Record 32, 36.

²Under OAR 661-010-0015(1)(b) a NITA is considered filed on “the date the [NITA] is received by the Board, or the date the [NITA] is mailed, provided it is mailed by registered or certified mail.” The NITA that was mailed on December 21, 2000, was not sent by registered or certified mail. Therefore, the earliest the NITA could have been considered filed under OAR 661-010-0015(1) was December 27, 2000, which is 21 days after the challenged decision became final.

³OAR 661-010-0015(4) requires a filing fee and deposit for costs in the total amount of \$325. OAR 661-010-0015(1)(b) provides, in part:

“* * * A [NITA] unaccompanied by payment of the fee and deposit required by [OAR 661-010-0015(4)] shall not be accepted for filing.”

1 **B. Second NITA**

2 Petitioner's second NITA was filed by certified mail on December 28, 2000, with a
3 check for \$325 for the required filing fee and deposit for costs.⁴ LUBA administrative staff
4 sent a letter to the parties advising them that a notice of intent to appeal had been sent to
5 LUBA on December 28, 2000, by certified mail and had been received by LUBA on January
6 3, 2001.

7 **C. Subsequent Events**

8 Following receipt of the second NITA, the following material events have transpired:

- 9 1. On January 16, 2001, LUBA received the record in this appeal and on
10 January 17, 2001, LUBA advised the parties that the record had been
11 received.
- 12 2. On January 16, 2001, the City of Jacksonville moved to intervene in
13 this appeal on the side of respondent and also moved to dismiss
14 arguing the December 28, 2000 NITA was not timely filed.
- 15 3. On February 8, 2001, petitioner filed a memorandum opposing the
16 motion to intervene and taking the position that the city's attorney
17 lacked authority to file the motion to intervene or the motion to
18 dismiss.
- 19 4. On February 8, 2001, petitioner filed a motion requesting mediation in
20 this matter and that the appeal be stayed to allow mediation.
- 21 5. On February 14, 2001, the county filed a memorandum stating it
22 would not enter mediation with petitioner. The county also moved to
23 dismiss the appeal, arguing that petitioner failed to file a timely
24 petition for review.
- 25 6. On February 21, 2001, LUBA issued an order suspending the appeal
26 until it had an opportunity to rule on the pending motions.

⁴The NITA that petitioner filed on December 28, 2000, appears to be a copy of the NITA that was mailed to LUBA on December 21, 2000, however, petitioner's attorney signed the second NITA a second time immediately below the signature that appeared on the first NITA and added his correct telephone number. The same certificate of service that was attached to the original NITA, indicating service by mail on December 21, 2000, was attached to the second NITA. As far as we can tell, the December 28, 2000 NITA was not served on any other party.

1 **MOTION TO INTERVENE**

2 ORS 197.830(7)(b)(B) allows intervention in a LUBA appeal by “[p]ersons who
3 appeared before the local government, * * * orally or in writing.” The City of Jacksonville
4 moves to intervene on the side of respondent. The city alleges that it presented oral and
5 written testimony to the decision maker in this matter. Petitioner opposes the motion to
6 intervene and requests a hearing to consider her opposition to the motion to intervene. We
7 deny the request for a hearing, but consider petitioner’s arguments opposing the motion to
8 intervene below.

9 Petitioner first argues the city is not a “person,” within the meaning of ORS
10 197.830(7)(b)(B). Petitioner is wrong. As used in ORS chapter 197, “person” is defined to
11 include “any * * * governmental subdivision or agency * * * of any kind.” ORS
12 197.015(18). The city qualifies as a “person,” within the meaning of ORS 197.830(7)(b)(B).

13 Petitioner next argues the city must also demonstrate that it will suffer some actual
14 damage or harm if petitioner successfully challenges the appealed decision, which denies
15 petitioner’s application for a conditional use permit. ORS 197.830(7)(b)(B) imposes no such
16 requirement for intervention, and petitioner cites no other source of legal authority for
17 imposing such a requirement on the city.

18 Petitioner finally argues the motions filed by the city’s attorneys on January 16, 2001,
19 were filed without specific authority from the city council. As we explained in *Gettman v.*
20 *City of Bay City*, 28 Or LUBA 121, 122 (1994), “[LUBA] is not authorized to inquire
21 whether each document filed by an attorney representing a party in an appeal before [LUBA]
22 is specifically authorized.”

23 The city’s motion to intervene is granted.

24 **PETITIONER’S MOTION FOR STAY FOR MEDIATION**

25 Petitioner’s February 8, 2001 motion to stay this appeal to allow mediation does not
26 indicate that the city joined in that request. On February 14, 2001, the county opposed the

1 motion. A motion to stay a LUBA appeal “to allow the parties to enter mediation” under
2 ORS 197.860 expressly requires the agreement of “[a]ll parties.” Because all parties do not
3 agree to the request, it is denied.

4 **COUNTY MOTION TO DISMISS**

5 LUBA received the record in this appeal on January 16, 2001. Under our rules the
6 petition for review was due on February 6, 2001. OAR 661-010-0030(1).⁵ The county
7 moves to dismiss this appeal because no petition for review has been filed and no other
8 action has been taken that would extend or suspend the deadline for filing the petition for
9 review. *Id.*

10 Petitioner first suggests that the motion requesting a stay for mediation should have
11 the legal effect of extending the deadline for filing the petition for review. That motion was
12 submitted without the county’s or intervenor’s agreement and was filed two days *after* the
13 deadline for filing the petition for review expired. We reject petitioner’s suggestion that her
14 unilateral February 8, 2001 motion for stay to enter mediation had any effect on the February
15 6, 2001 deadline for filing the petition for review. OAR 661-010-0065(4).⁶

16 Petitioner’s argument that the city’s January 16, 2001 motions to intervene and to
17 dismiss and petitioner’s response to those motions and request for a hearing suspended the

⁵OAR 661-010-0030(1) provides:

“Filing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. See OAR 661-010-0025(2) and 661-010-0026(6). * * * Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) [motion to consider evidence outside the record] or OAR 661-010-0067(2) [stipulated agreement of all parties or LUBA extension to allow time to rule on motion to dismiss], shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. See OAR 661-010-0075(1)(c).”

⁶OAR 661-010-0065(4) provides:

“Effect of Filing Motion: Except as provided in OAR 661-010-0026(6) with regard to objections to the record and OAR 661-010-0045(9) with regard to motions to take evidence, or as may otherwise be ordered by the Board on its own motion, the filing of a motion shall not suspend the time limits for other events in the review proceeding.”

1 deadline for filing the petition for review is also without merit. Under
2 OAR 661-010-0067(2), LUBA “may, on a motion of a party or its own motion, extend the
3 deadline for filing the petition for review to allow time to rule on a motion to dismiss.” In
4 this case, petitioner’s opposition to the motion to dismiss was limited to her claim that the
5 city’s attorney lacked specific authority to file the motion to dismiss. Perhaps more
6 importantly, petitioner’s February 8, 2001 memorandum opposing the city’s motion to
7 intervene and motion to dismiss was not filed until two days after the deadline for filing the
8 petition for review expired.

9 Petitioner did not move to extend the deadline for filing the petition for review, and
10 LUBA did not extend that deadline on its own motion. Because petitioner did not obtain the
11 written consent of all parties to extend the deadline for filing the petition for review and did
12 not file a motion requesting that LUBA do so, that deadline expired on February 6, 2001.
13 The deadline for filing the petition for review is strictly enforced. *Terrace Lakes*
14 *Homeowners Assn. v. City of Salem*, 29 Or LUBA 532, *aff’d* 138 Or App 188, 906 P2d 870
15 (1995); *Bongiovanni v. Klamath County*, 29 Or LUBA 351 (1995).

16 Finally, on February 21, 2001, petitioner filed a motion requesting that we suspend
17 our procedural rules based on alleged misconduct by certain county officials and conduct a
18 hearing to inquire into that alleged misconduct. Nothing in that motion or the argument that
19 is presented in support of that motion affects our conclusion that the petition for review in
20 this appeal was due on February 6, 2001 and was not filed on or before that date.
21 Accordingly, this appeal is dismissed.⁷

⁷If petitioner’s submittal of the filing fee and deposit for costs by certified mail 22 days after the challenged decision became final was not sufficient to result in timely filing of the NITA, that would provide a second basis for dismissing this appeal. The city argues that we should dismiss this appeal for that reason. *But see Ray v. Douglas County*, 140 Or App 24, 914 P2d 26 (1996) (concluding, based on the facts in that case, that petitioners’ failure to timely submit the filing fee and deposit for costs did not deprive LUBA of jurisdiction over the appeal). Neither the city nor petitioner cites or discusses *Ray*, which is the appellate court case that bears most directly on the question. Because this appeal must be dismissed in any event, we do not consider

whether the factual differences in this case are sufficient to distinguish *Ray* and support a conclusion that the NITA was not timely filed.