

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

3
4 ROBERT ROOKARD,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11 and

12
13 ANTHONY L. BERRY and JERRY A. PACE,
14 *Intervenors-Respondent.*

15
16 LUBA No. 2001-046

17
18 FINAL OPINION
19 AND ORDER

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21 Appeal from Lane County.

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23 Douglas M. DuPriest, Eugene, filed the petition for review. With him on the brief
24 was Hutchinson, Cox, Coons, & DuPriest, P.C.

25
26 Stephen L. Vorhes, Eugene, represented respondent.

27
28 P. Steven Cornacchia, Eugene, represented intervenors-respondent.

29
30 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,
31 participated in the decision.

32
33 DISMISSED

34 11/02/2001

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

38

NATURE OF THE DECISION

Petitioner appeals a county decision vacating a county road.

FACTS

The county established Marcus Jessen Road in 1914 with a right-of-way width of 60 feet. The road is approximately 1.3 miles long, and connects Fir Butte Road on the west with Green Hill Road on the east. The western one-quarter mile of the road has been improved with a single gravel lane; the remainder is unimproved. The existing improved road provides access to a residence on petitioner’s property, which is otherwise landlocked. Petitioner’s property, and all pertinent property surrounding the road, is zoned for exclusive farm use.

In April 2000, the owners of property abutting the road signed a petition asking the county to vacate Marcus Jessen Road. At that time petitioner’s property was owned by his father. Petitioner’s father died shortly after the petition to vacate was filed, and his heirs, including petitioner, opposed the petition. In September 2000, the owners of property between petitioner’s property and Green Hill Road executed an agreement that created a private easement to provide access to petitioner’s property. On February 14, 2001, the county board of commissioners conducted a public hearing and voted to grant the petition to vacate. An order to that effect was entered the same date. This appeal followed.

MOTION TO TRANSFER TO CIRCUIT COURT

On September 14, 2001, the same date petitioner filed the petition for review, petitioner filed a motion to transfer this appeal to circuit court, pursuant to ORS 34.102(4)¹

¹ORS 34.102(4) provides, in relevant part:

“A notice of intent to appeal filed with [LUBA] pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation * * * that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. * * *”

1 and OAR 661-010-0075(11).² The statute and rule generally provide that if LUBA
2 determines that an appeal does not challenge a land use or limited land use decision subject
3 to LUBA’s jurisdiction, LUBA shall transfer the appeal to circuit court.

4 The petition for review takes the position that the county’s decision is a land use
5 decision subject to LUBA’s jurisdiction under either the statutory test at ORS 197.015(10) or
6 the “significant impacts” test described in *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d
7 1193 (1977) and *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). In the motion
8 to transfer, petitioner argues that certain *issues* involved in this case and discussed in the
9 petition for review are issues that, had they been raised in a context other than in a land use
10 decision, would fall within the exclusive jurisdiction of the circuit court. Although petitioner
11 does not precisely identify these issues, we understand them to involve compliance with the
12 statutory requirements for road vacations set forth in ORS chapter 368. Petitioner argues that

13 “* * * In the event LUBA determines that it does not have jurisdiction over
14 some or all of these issues, petitioner requests transfer to circuit court of those
15 portions of the case not falling within LUBA’s jurisdiction.” Motion to
16 Bifurcate or Transfer to Circuit Court 4.

²OAR 661-010-0075(11) provides:

“Motion to Transfer to Circuit Court:

- “(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).
- “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue.
- “(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”

1 The county and intervenors-respondent (together, respondents) argue that petitioner’s
2 motion should be denied, because the pertinent statute and rule do not provide for transfer of
3 discrete *issues* arising from a decision. According to respondents, where a land use decision
4 applies both land use standards (*e.g.*, land use regulations) and non-land use standards,
5 LUBA has the authority to review the entire decision for compliance with applicable law,
6 including non-land use standards. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98 (2000);
7 *Cedar Mill Creek Corr. Comm. v. Washington County*, 38 Or LUBA 333, 342 (2000);
8 *Johnson v. City of La Grande*, 37 Or LUBA 380, 385 (1999), *aff’d* 167 Or App 35, 1 P3d
9 1036 (2000). Respondents argue that LUBA may transfer an appeal to circuit court only if it
10 concludes that the *decision* challenged in the appeal is not a land use or limited land use
11 decision.

12 We agree with respondents that we may only transfer an appeal to circuit court where
13 we conclude that the decision being appealed is not a land use or limited land use decision
14 subject to our jurisdiction, and that we lack authority to transfer only discrete issues raised in
15 an appeal. Reading the statute and rule to provide such authority, as petitioner urges, is
16 inconsistent with the cases cited above, and would create the very jurisdictional confusion
17 that the statute and rule are designed to avoid.

18 Petitioner’s motion to transfer is denied.

19 **MOTION TO DISMISS**

20 The petition for review in this case was due September 13, 2001. Petitioner filed the
21 petition for review one day late, on September 14, 2001. Respondents move to dismiss this
22 appeal, for failure to file the petition for review within the time prescribed in LUBA’s rules.
23 OAR 661-010-0030(1).³

³OAR 661-010-0030(1) provides:

“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)

1 Petitioner responds that the late filing was the result of a calendaring mistake, and not
2 done for purposes of delay. Petitioner recognizes that the deadline for filing the petition for
3 review is strictly enforced. OAR 661-010-0005; *Terrace Lakes Homeowners Assoc. v. City*
4 *of Salem*, 29 Or LUBA 532, *aff'd* 138 Or App 188, 906 P2d 871 (1995); *Bongiovanni v.*
5 *Klamath County*, 29 Or LUBA 351 (1995).⁴ Nonetheless, petitioner argues that his failure to
6 comply with that deadline should not result in dismissal of this case, for two reasons.

7 First, petitioner argues, the statutes governing LUBA's procedures and review do not
8 provide that an untimely petition for review results in dismissal. That requirement exists
9 only in LUBA's rules, specifically OAR 661-010-0030(1). Petitioner argues that the rule is
10 inconsistent with the statute and therefore should not be applied. Second, petitioner argues
11 that the one-day delay in filing the petition for review did not prejudice any party's
12 substantial rights, and therefore a waiver or exception to the requirements of OAR 661-010-
13 0030(1) is warranted.

14 We reject both arguments. ORS 197.830(11) provides that a petition for review
15 "shall be filed with [LUBA] as required by [LUBA] under subsection (13) of this section."
16 ORS 197.830(13)(a) in turn provides that LUBA "shall adopt rules establishing deadlines for
17 filing petitions and briefs[.]" OAR 661-010-0030(1) implements those statutory provisions.

and 661-010-0026(6). The petition shall also be served on the governing body and any party who has filed a motion to intervene. 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) or OAR 661-010-0067(2), 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)."

⁴OAR 661-010-0005 provides:

"These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation."

1 The question of whether it is consistent with LUBA's statutes to dismiss an appeal for failure
2 to timely file the petition for review was answered in the affirmative long ago. *Hoffman v.*
3 *City of Portland*, 294 Or 150, 152, 654 P2d 1106 (1982) (LUBA may dismiss an appeal for
4 failure to timely file the petition for review). LUBA thereafter concluded that dismissal of an
5 appeal for failure to timely file the petition for review is necessary to implement the statutory
6 policy that "time is of the essence" in land use matters. ORS 197.805; *Hoffman v. City of*
7 *Portland*, 7 Or LUBA 213 (1983); *Mastrantonio-Meuser v. Multnomah County*, 7 Or LUBA
8 134 (1983). OAR 661-010-0030(1) and its predecessors were promulgated, pursuant to
9 ORS 197.830(11) and (13) and their predecessors, to implement that statutory policy.
10 Absent circumstances not present here, OAR 661-010-0030(1) mandates dismissal of an
11 appeal for failure to timely file the petition for review. An agency must comply with the
12 statutes that govern it and follow its own rules. *Smith v. Veterinary Medical Examining*
13 *Board*, 175 Or App 319, 327, 27 P3d 1081 (2001).

14 Similarly, LUBA must follow OAR 661-010-0005, which states that failure to
15 comply with the deadline for filing the petition for review in OAR 661-010-0030(1) is not a
16 technical violation of LUBA's rules. The absence of prejudice to other parties from such
17 violation is not a basis to avoid the dismissal mandated by OAR 661-010-0030(1).

18 Because petitioner failed to file the petition for review within the time prescribed in
19 our rules, we must dismiss this appeal.