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

SHARON E. PEEBLES,)
)
Petitioner,)
)
vs.)
)
CITY OF WILSONVILLE,)
)
Respondent,)
)
and)
)
WILLAMETTE VALLEY HOMES, INC.,)
)
Intervenor-Respondent.)

LUBA No. 97-088 and 97-247

FINAL OPINION
AND ORDER

Appeal from City of Wilsonville.

Sharon E. Peebles, Wilsonville, filed the petition for review on her own behalf.

Michael E. Kohlhoff, City Attorney, Wilsonville, represented respondent.

Ted A. Troutman, Portland, represented intervenor-respondent.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

DISMISSED 03/25/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner in these consolidated appeals challenges two
4 city resolutions (1) granting preliminary and final plan
5 approval for six proposed condominiums in the Charbonneau
6 subdivision, and (2) denying petitioner's local appeal of the
7 site and design plan approval.

8 **MOTION TO INTERVENE**

9 Willamette Valley Homes, Inc. (intervenor), the applicant
10 below, moves to intervene on the side of respondent. There is
11 no opposition to the motion, and it is allowed.

12 **FACTS**

13 Petitioner's appeals of two related city decisions were
14 consolidated by order of this Board on December 2, 1997. As
15 part of that order, we directed that the city "shall submit a
16 single consolidated record to the Board on or before December
17 23, 1997." Order on Consolidation 1.

18 Petitioner was out of the state on vacation from December
19 19, 1997 through January 4, 1998, and made arrangements with
20 the city recorder to have the record delivered to petitioner's
21 home in her absence.¹ Petitioner states that she spoke with

¹All parties have submitted numerous memoranda and affidavits regarding the sequence of events giving rise to the pending motion to dismiss, including recitation of facts not in the record. Absent objection, this Board will consider evidence outside the record in determining whether we have jurisdiction. Mazeski v. Wasco County, 31 Or LUBA 126, 128 (1996). In this final opinion and order, we rely only upon undisputed factual statements by the parties in their affidavits and memoranda. Any disputed facts set forth in this order are identified as such, and are not relied upon by this Board in its final determination.

1 the city recorder and "agreed that the record would be
2 delivered to Petitioner's home on December 23, 1997, and that
3 Petitioner would arrange to have it picked up and placed
4 inside." Petitioner's Memorandum in Opposition to Motion to
5 Dismiss 1.

6 The city filed the record via personal delivery to LUBA
7 on December 22, 1997. On the same date, the city recorder
8 personally delivered a copy of the record to petitioner's
9 residence and placed it at the front door as instructed by
10 petitioner. Respondent's Supplemental Memorandum in Support
11 of Motion to Dismiss. On December 23, 1997, a friend of
12 petitioner's picked up the record and placed it inside
13 petitioner's house. Petitioner's Memorandum in Opposition to
14 Motion to Dismiss 2.

15 On December 23, 1997, LUBA sent notice of record
16 transmittal to the parties erroneously stating that the Board
17 had received the record on December 23, 1997, and that "[t]he
18 petition for review is due twenty-one days after receipt of
19 the record by the Board." On December 24, 1997, after
20 discovering the error, LUBA's administrative specialist sent a
21 second letter to the parties, stating, in relevant part:

22 "On December 23, 1997 I mailed a letter stating that
23 the Board is in receipt of the record transmittal
24 for the above-referenced appeal. However, the date
25 the record was received by the Board was incorrectly
26 identified as December 23, 1997. **The correct date**
27 **of receipt of the record by the Board is December**
28 **22, 1997.**

29 "Please calculate the briefing schedule from
30 December 22, 1997. The petition for review is due

1 twenty-one days after receipt of the record by the
2 Board." (Emphasis in original).

3 Under the corrected briefing schedule, the petition for
4 review was due on January 12, 1998. Petitioner mailed copies
5 of the petition for review to the other parties on January 12,
6 1998; however, the petition for review was hand-delivered to
7 LUBA on January 13, 1998.

8 **MOTION TO DISMISS**

9 The city moves to dismiss petitioner's appeal for lack of
10 jurisdiction on the ground that the petition for review was
11 not filed within 21 days after the record was received by the
12 Board. OAR 661-10-030(1) provides, in relevant part:

13 "The petition for review shall be filed with the
14 Board within 21 days after the date the record is
15 received by the Board. * * * Failure to file a
16 petition for review within the time required by this
17 section * * * shall result in dismissal of the
18 appeal and forfeiture of the filing fee and costs to
19 the governing body."

20 Petitioner responds with an array of factual and legal
21 arguments explaining why this appeal should not be dismissed.
22 Petitioner's factual assertions can be summarized as follows:
23 (1) petitioner was out of town when the record was delivered
24 to her home, and thus she was unaware of the actual date of
25 delivery; (2) petitioner believed, based on her conversation
26 with the city recorder, that the record would be delivered on
27 December 23, 1997; (3) petitioner's belief that the record was
28 delivered on December 23, 1997 was confirmed by the first
29 letter from LUBA that erroneously stated the date of record
30 transmittal as December 23, 1997; (4) petitioner was unaware

1 of the actual date the record was filed because she did not
2 open the second, corrected letter from LUBA until January 17,
3 1998; (5) petitioner was unaware of the actual date the record
4 was filed because the copy of the record delivered to
5 petitioner's home did not contain a certificate of service
6 setting forth the date it was filed and served;² and (6)
7 petitioner filed the petition for review on January 13, 1998
8 based on her belief that the record had been filed on December
9 23, 1997.³

10 Petitioner's primary legal argument appears to be that,
11 under OAR 661-10-025(3) and 661-10-075(2)(b)(B), a local
12 government's service of the record on a petitioner cannot be
13 accomplished by delivery to a residence without actual service
14 on a person.⁴ Petitioner contends that, where a local

²Intervenor and the city dispute petitioner's claim that there was no certificate of service in the copy of the record delivered to petitioner. The copy of the record filed with LUBA contains a certificate of service signed by the city attorney that states:

"I hereby certify that on December 22, 1997, I served a true and correct copy of the record in LUBA Case No. 97-088 and 97-247 Consolidated, on Petitioner by delivering said copy to the following person at her last known address * * *."

³Intervenor disputes petitioner's assertion that, at the time of filing the petition for review, she actually believed it was due on January 13, 1998. Intervenor points to a telephone message from petitioner on January 12, 1998 that resulted in a telephone conversation between petitioner and intervenor's attorney on January 13, 1998 in which petitioner requested an extension of time for filing the petition for review. Intervenor's Reply to Petitioner's Response to Motion to Dismiss, Exhibit 1, page 2.

⁴OAR 661-10-025(3) provides, in relevant part:

"Service of Record: Contemporaneously with transmittal, the governing body shall serve a copy of the record, exclusive of large maps, tapes, and documents which are difficult to duplicate, on the petitioner or the lead petitioner, if one is designated."

1 government does not serve the petitioner with a copy of the
2 record via first-class mail, and does not serve the petitioner
3 in person, the petitioner has no way to know what date the
4 record was transmitted to LUBA. Petitioner argues:

5 "[The city] elected to personally deliver the record
6 not to Petitioner's office at the Department of
7 Justice, which was open on December 22nd and 23rd
8 and which is located a scant four blocks from the
9 Board's offices, but to Petitioner's home with full
10 knowledge that neither Petitioner nor anyone else
11 was at home to accept delivery of the record. For
12 the reasons hereafter discussed, the Petitioner
13 urges the Board to require that under its rules,
14 'service in person' and 'personal delivery' mean
15 delivery to a person. Otherwise, a governing body
16 could, as in this case, deposit the record at a
17 Petitioner's home, and deprive the Board of any
18 record showing whether Petitioner had been served
19 via personal delivery other than the [city's] word
20 on it." Petitioner's Memorandum in Opposition to
21 Motion to Dismiss 8.

22 In support of her position, petitioner contends that LUBA
23 "has consistently held that if the notice of intent to appeal
24 or the petition for review are not received by the Board on
25 the due date by someone who may accept them," the Board will
26 dismiss the appeal. Id. Petitioner is partially correct.
27 OAR 661-10-015(1)(b) requires that a notice of intent to

OAR 661-10-075(2)(b) provides, in relevant part:

"(b) Service:

"(A) Any document filed with the Board, other than the
record as provided in OAR 661-10-025(3) * * *, must
also be served on all parties contemporaneously.
* * *;

"(B) Service may be in person or by first-class mail.
Mail service is complete on deposit in the mail."

1 appeal must be physically received at LUBA by the due date in
2 order to be timely filed.⁵ However, that rule and the cases
3 implementing it have no bearing on the rules regarding the
4 filing of a petition for review, which allow for filing by
5 "mailing on or before the date due." OAR 661-10-075(2)(a).
6 Similarly, the rules regarding service of the record on
7 petitioners also specifically allow for service by mail. OAR
8 661-10-075(2)(b)(B). The cases cited by petitioner do not
9 provide support for her position that the record must be
10 personally handed to a petitioner in order to be "served"
11 under LUBA's rules.⁶

12 Petitioner further argues that service by the city of a
13 copy of the record should be governed by the provisions of
14 ORCP 7 regarding service of summons in a civil proceeding. We
15 disagree. This Board has on occasion relied on the provisions
16 of ORCP when our rules do not address specific procedural
17 issues. See, e.g., Tuality Lands Coalition v. Washington
18 County, 21 Or LUBA 611, 620 (1991). However, in the present
19 situation, OAR 661-10-025(3) and 661-10-075(2) provide
20 unambiguous rules regarding service of the record on

⁵However, this rule has been recently amended, effective March 1, 1998, to allow for filing by mailing the notice of intent to appeal via registered or certified mail on the due date.

⁶A critical fact, apparently overlooked by petitioner in her argument, is that the record in this case was served on petitioner via deposit on her doorstep pursuant to her agreement with the city. We need not decide whether the method of service used in this case would be sufficient under OAR 661-10-075(2)(b)(B) in the absence of an express agreement between the petitioner and the local government.

1 petitioners; therefore, there is no reason to look to the
2 ORCP. Moreover, the provisions of ORCP 7 create requirements
3 for the service of summons and complaint on defendants in
4 civil proceedings. The purpose of those requirements is to
5 "apprise the defendant of the existence and pendency of the
6 action and to afford a reasonable opportunity to appear and
7 defend." ORCP 7D(1). Specific methods of service are set
8 forth in ORCP 7D in order to ensure that civil proceedings are
9 not prosecuted against defendants who have not been notified
10 of actions against them. In contrast, OAR 661-10-075(2)(b)
11 merely requires the city to send a copy of the record on
12 review to the petitioner. We believe the purpose of ORCP 7D
13 is insufficiently related to the "service" requirements of OAR
14 661-10-025(3) to provide meaningful guidance regarding the
15 interpretation of that rule.

16 Petitioner also relies on Hearne v. Baker County, 15 Or
17 LUBA 635 (1987) and other LUBA decisions involving situations
18 where the local government failed to serve the record on
19 petitioners contemporaneously with transmittal to the Board.
20 However, these cases do not apply to the present situation,
21 because service in this case was contemporaneous. The
22 certificates of filing and service attached to the record
23 indicate that the city delivered a copy of the record to
24 petitioner's house on December 22, 1997, the same day that the
25 record was delivered to LUBA. Petitioner does not dispute
26 that the city "may have deposited the record on Petitioner's

1 doorstep on December 22, 1997." Petitioner's Supplemental
2 Memorandum in Opposition to Motion to Dismiss 2. Petitioner
3 offers no basis for this Board to conclude that the record was
4 delivered to petitioner's house any later than December 22,
5 1997.

6 Finally, petitioner argues that this Board should
7 "not hold petitioner responsible for the [city's]
8 violation of [OAR 661-10-025(3)] or for [LUBA]
9 staff's inadvertant error in failing to send the
10 corrected notice in a manner reasonably calculated
11 to impart actual notice to Petitioner of the earlier
12 due date of the petition for review." Petitioner's
13 Memorandum in Opposition to Motion to Dismiss 21-22.

14 First, we have already determined that the city did not
15 violate OAR 661-10-025(3). Pursuant to arrangments made with
16 petitioner, the city delivered the record to petitioner's home
17 and left the record on her doorstep. The record was delivered
18 to petitioner's home contemporaneously with transmittal to
19 LUBA.

20 Regarding the erroneous notice of transmittal letter sent
21 by LUBA on December 23, 1997 and the subsequent correction on
22 December 24, 1997, petitioner contends that, because LUBA's
23 staff sent the second letter via regular mail, the notice was
24 not "sent in a manner reasonably calculated to impart actual
25 knowledge of the changed date." Id. at 21. Petitioner
26 contends that the second letter did not constitute sufficient
27 notice because it was not sent via certified mail. We
28 disagree. Our rules do not require that notices of
29 transmittal, or any other notices from this Board, be sent via

1 certified mail. There is no dispute that this Board's
2 December 24, 1997 letter arrived at petitioner's house prior
3 to petitioner's return from her vacation on January 4, 1998.
4 This Board is not responsible for petitioner's failure to read
5 that letter until January 17, 1998.

6 OAR 661-10-030(1) requires that we dismiss any appeal for
7 which a petition for review has not been received by the board
8 within 21 days after the date the record is received by the
9 Board. The deadline for filing a petition for review is
10 strictly enforced. As we stated in Terrace Lakes Homeowners
11 Assoc. v. City of Salem, 29 Or LUBA 532, 535 (1995),

12 "[t]he city did not fail to serve the record on
13 petitioners on the same day as it filed the record
14 with LUBA. Service of the record on petitioners was
15 by a method allowed by our rules. Our letter
16 expressly stated when the record had been received
17 by LUBA."

18 In our letter of December 24, 1997, petitioner was notified of
19 the actual date the record was filed. That letter instructed
20 petitioner to calculate the date the petition for review would
21 be due from December 22, 1997. The petition for review was
22 delivered to LUBA twenty-two days after that date;
23 accordingly, the city's motion to dismiss is granted.

24 This appeal is dismissed.