

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

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

NORTH PARK ANNEX BUSINESS TRUST,)
INC. and LABECKS, INC.,)
Petitioners,)
vs.)
CITY OF INDEPENDENCE,)
Respondent.)

LUBA No. 98-180
FINAL OPINION
AND ORDER

Appeal from City of Independence.

William F. Hoelscher, Tigard, represented petitioners.

Richard D. Rodeman, Corvallis, represented respondent.

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

DISMISSED 02/23/99

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

1 Opinion by Holstun.

2 **MOTION TO DISMISS**

3 On February 8, 1999, respondent moved to dismiss this appeal because the petition
4 for review was not filed on or before February 1, 1999. The petition for review in this appeal
5 was filed on February 9, 1999. Petitioners oppose the motion to dismiss, arguing that the
6 petition for review was due February 12, 1999.

7 ORS 197.830(10) requires that a petition for review shall be filed within the deadlines
8 established by Board rule. OAR 661-010-0030(1) provides, in relevant part:

9 "The petition for review together with four copies shall be filed with the
10 Board within 21 days after the date the record is received or settled by the
11 Board. * * * Failure to file a petition for review within the time required by
12 this section, and any extensions of that time under * * * OAR 661-010-
13 0067(2), shall result in dismissal of the appeal." (Emphasis added.)

14 On January 11, 1999, the Board issued an Order on Record Objections. That order stated:

15 "The record is settled as of the date of this order. The petition for review shall
16 be due 21 days after the date of this order. * * *" Order on Record Objections
17 1.

18 Under the January 11, 1999 order, the petition for review in this appeal was due February 1,
19 1999. The Certificate of Service attached to the January 11, 1999 order states that a copy of
20 the order was mailed to petitioners' attorney and to respondent's attorney, and no party claims
21 that it failed to receive a copy of the order.

22 If the petition for review was due on February 1, 1999, as provided in our January 11,
23 1999 order, this appeal must be dismissed. This Board has explained on numerous occasions
24 that where a petition for review is not filed within the deadlines established by our rules or
25 any stipulated extension, the appeal must be dismissed. Bongiovanni v. Klamath County, 29
26 Or LUBA 351, 353 (1995); McCauley v. Jackson County, 20 Or LUBA 176 (1990); Piquette
27 v. City of Springfield, 16 Or LUBA 47 (1987); Hutmacher v. Marion County, 15 Or LUBA
28 514 (1987). We turn to petitioners' argument that, notwithstanding the January 11, 1999
29 order, the petition for review was due February 12, 1999.

1 Petitioners argue that the record in this appeal was "settled by the Board" on January
2 22, 1999. Petitioners do not dispute that the Board's January 11, 1999 order expressly states
3 that the record was settled on January 11, 1999. More importantly, neither do petitioners
4 claim that they did not receive the Board's January 11, 1999 order. Petitioners' argument that
5 the record was settled on January 22, 1999, is based entirely on two telephone conversations
6 with LUBA administrative staff. In both of those conversations, LUBA staff consulted
7 LUBA's case diary and incorrectly informed petitioners' attorney that the order settling the
8 record was issued on January 22, 1999.¹

9 LUBA staff's misstatement concerning the date the record was settled is unfortunate.
10 However, petitioners cannot rely on that misstatement to extend the deadline for filing the
11 petition for review. As the Oregon Supreme Court explained in a similar circumstance, a
12 party's failure to meet a statutory deadline "is not excused merely by reason of a clerk's error
13 in responding to a telephone inquiry." Columbia River Television v. Multnomah Co., 299 Or
14 325, 329, 702 P2d 1065 (1985) (citing Far West Landscaping v. Modern Merchandising, 287
15 Or 653, 601 P2d 1237 (1979); see also Kellogg Lake Friends v. Clackamas County, 17 Or
16 LUBA 708, 712 n 3 (1989) (LUBA staff statements may not be relied upon to waive
17 mandatory statutory requirements). Similarly, in this case, if petitioners elect to rely on
18 LUBA staff to determine the date the record is settled, rather than make that determination
19 themselves by directly referring to the Order on Record Objections, petitioners assume the
20 risk of such reliance. In the circumstances presented in this appeal, LUBA staff's error does
21 not warrant extending the deadline established by our rules for filing the petition for review.

22 Because a petition for review was not filed within 21 days after the record was
23 settled, and petitioners did not obtain written consent to extend the time for filing the petition

¹An error apparently occurred in entering the date the Order on Record Objections was issued in LUBA's case diary. The correct date "January 11, 1999" was incorrectly entered as "January 22, 1999." When LUBA staff consulted the diary to respond to petitioners' attorney's question, the diary was consulted and the incorrect date was given in response to petitioners' attorney's inquiries.

1 for review under OAR 661-010-0067(2) beyond February 1, 1999, ORS 197.830(10) and
2 OAR 661-010-0030(1) require that we dismiss this appeal. Terrace Lakes Homeowners
3 Assoc. v. City of Salem, 29 Or LUBA 532, 535, aff'd 138 Or App 188 (1995).

4 This appeal is dismissed.