

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 COREY G. LARNER and
5 JEFF L. JORGENSEN,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF PORTLAND,
11 *Respondent,*
12

13 and
14

15 6710 LLC,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2002-007
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Portland.
24

25 Cory Larner and Jeff Jorgenson, Portland, represented themselves.
26

27 Frank Hudson, Deputy City Attorney, Portland, represented respondent.
28

29 Roger A. Alfred, Portland, represented intervenor-respondent.
30

31 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
32 participated in the decision.
33

34 DISMISSED

03/05/2002
35

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

Holstun, Board Chair.

MOTION TO DISMISS

Intervenor-respondent moves to dismiss. Intervenor contends the notice of intent to appeal was not timely filed and for that reason this appeal must be dismissed.

As relevant, ORS 197.830(9) provides as follows:

“A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. * * * The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of \$175 and a deposit for costs to be established by the board. * * *”

Under ORS 197.830(9) the form and manner of filing a notice of intent to appeal is established by LUBA rule. The relevant rule is OAR 661-010-0015(1)(a) and (b), which provide as follows:

“(a) The Notice [of Intent to Appeal], together with two copies, and the filing fee and deposit for costs * * * shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3) through (5). * * * *A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.*

“(b) The date of filing a notice of intent to appeal is the date the Notice [of Intent to Appeal] is received by the Board, or the date the Notice [of Intent to Appeal] is mailed, *provided it is mailed by registered or certified mail* and the party filing the Notice [of Intent to Appeal] has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number. * * *” (Emphases added.)

The above statutory and rule provisions establish that an appeal will be dismissed if the notice of intent to appeal is not filed within 21 days after the appealed decision becomes final. If the notice of intent to appeal is mailed by registered or certified mail, the filing date

1 is the date of mailing. If it is not mailed by registered or certified mail, the notice of intent to
2 appeal is considered filed on the date it is received by LUBA.¹

3 The facts are undisputed. The challenged decision was final on December 20, 2001.
4 Under ORS 197.830(9) and OAR 661-010-0015(1)(a) petitioners' notice of intent to appeal
5 was due 21 days later, on January 10, 2002. Petitioners mailed the notice of intent to appeal
6 to LUBA on January 10, 2002. However, petitioners did not mail that notice of intent to
7 appeal by certified or registered mail; they mailed it by first class mail. Accordingly, under
8 OAR 661-010-0015(1)(b) it was filed on January 11, 2002, the date it was actually received
9 by LUBA. Because petitioners' notice of intent to appeal was filed 22 days after the
10 challenged decision became final, this appeal must be dismissed under OAR 661-010-
11 0015(1)(a) and (b).²

12 **NOTICE OF WITHDRAWAL FOR RECONSIDERATION**

13 On January 28, 2002, nine days before intervenor filed its motion to dismiss, the city
14 gave notice that it was withdrawing the challenged decision for reconsideration under OAR

¹OAR 661-010-0075(2) provides that most documents will be considered filed when they are mailed "by first class mail." However OAR 661-010-0075(2) also makes it clear that OAR 661-010-0015(1)(b) determines the manner in which the date of filing a notice of intent to appeal will be determined.

"Filing and Service:

"(a) Except as provided in OAR 661-010-0015(1)(b) with regard to the notice of intent to appeal, and as provided in OAR 661-010-0021(5)(b) with regard to a refiled original notice of intent to appeal or an amended notice of intent to appeal, filing a document with the Board is accomplished by:

"(A) Delivery to the Board on or before the date due; or

"(B) Mailing on or before the date due by first class mail with the United States Postal Service.

"(C) Documents may not be filed by facsimile. Documents that are filed by delivery or mailing may include facsimile signatures."

²We note that OAR 661-010-0005 provides that we may overlook technical violations of our rules where there would be no prejudice to a party's substantial rights in doing so. However, OAR 661-010-0005 explicitly states that "[f]ailure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) * * * is not a technical violation."

1 661-010-0021 and ORS 197.830(13)(b). We notified the parties by letter that the notice of
2 withdrawal suspended this appeal until a decision on reconsideration is filed with LUBA.
3 Under OAR 661-010-0021(1), the city has 90 days from January 28, 2002, to file its decision
4 on reconsideration. On February 13, 2002, the city advised LUBA and the parties that it had
5 scheduled a hearing for reconsideration of the appealed decision on March 5, 2002. On
6 February 20, 2002, intervenor requested an expedited ruling on the motion to dismiss.

7 We recognize that the January 28, 2002 notice of withdrawal, the pending March 5,
8 2002 hearing and our decision that this appeal must be dismissed raise potential questions
9 about (1) the propriety of continued consideration of the withdrawn decision; (2) whether
10 any decision on reconsideration could be reviewed by LUBA under OAR 661-010-0021(5);
11 and (3) whether any decision on reconsideration could be successfully challenged in a
12 separate appeal based on the above-described history that led to the reconsidered decision.
13 Intervenor suggests answers to some of those questions, and no other party has responded to
14 those suggestions.

15 At this point, we do not believe it is appropriate to consider intervenor's suggestions
16 concerning the possible consequences of our decision that this appeal must be dismissed. If
17 petitioner files an amended or refiled notice of intent to appeal or if a new appeal is filed
18 challenging any decision the city may render on reconsideration, it may be appropriate for us
19 to consider some or all of the questions noted above.

20 This appeal is dismissed.