

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

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4 PETER BOLLINGER, TERESA BOLLINGER,
5 LARRY BLACKBURN, MADY BLACKBURN,
6 PATRICIA BALL, JOE DECKARD, RICHARD
7 BAUM, JILL BAUM, RYAN BREVARD
8 and MARIANNE BREVARD,
9 *Petitioners,*

10
11 vs.

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13 CITY OF HOOD RIVER,
14 *Respondent,*

15
16 and

17
18 JEFF DULCICH,
19 *Intervenor-Respondent.*

20
21 LUBA No. 2003-189

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23 FINAL OPINION
24 AND ORDER

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26 Appeal from City of Hood River.

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28 Stuart A. Sugarman, Portland, represented petitioners.

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30 Alexandra Sosnkowski, Hood River, represented respondent.

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32 Peter Livingston, Portland, represented intervenor-respondent.

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34 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
35 participated in the decision.

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37 DISMISSED

03/12/2004

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

Opinion by Briggs.

Pursuant to OAR 661-010-0067(2), the parties stipulated to allow petitioners until February 12, 2004 to file the petition for review.¹ On February 13, 2004, LUBA received an original and four copies of the petition for review. The certificate of service appended to the petition for review stated that petitioner’s attorney filed the petition for review by first class mail on February 12, 2004. The metered postage stamp filed with the petition for review shows that the petition for review was mailed on February 13, 2004. Intervenor-respondent (intervenor) moves to dismiss this appeal, arguing that petitioners failed to file a timely petition for review, as is required by OAR 661-010-0030(1).²

Petitioners assert that the petition for review was provided to a U.S. Postal Service employee at the Portland Airport branch sometime between 11:58 p.m. and midnight on February 12, 2004. Petitioners attach an affidavit to their response from their attorney to support that assertion.³ Because the petition for review was placed in the hands of a post office employee for

¹ OAR 661-010-0067(2) provides, in relevant part:

“Except as provided in this section and OAR 661-010-0045(9), in no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties.
* * *”

² OAR 661-010-0030(1) provides, in relevant part:

“* * * 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. * * * Failure to file a petition for review within the time required by [OAR 661-010-0030(1)] and any extensions of that time under * * * 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. * * *”

A petition for review may be filed by “[m]ailing on or before the date due by first class mail with the United States Postal Service.” OAR 661-010-0075(2)(a)(B).

³ Petitioners’ attorney’s affidavit states, in relevant part:

“On the night of 12 February 2004[,] I brought an original and copies of the petition for review to the Portland Airport Post Office for the purpose of mailing those documents to LUBA. I also brought a copy of the brief to serve on [the city attorney.]”

1 delivery prior to midnight on February 12, 2004, petitioners argue that they filed a timely petition for
2 review, notwithstanding the February 13, 2004 postmark. *See Stull v. Hoke*, 326 Or 72, 78, 948
3 P2d 722 (1997) (Oregon Supreme Court “has consistently interpreted the term ‘filing’ to mean that
4 filing of a document ‘occur[s] when [the] document is given to a clerk with the intention that it be
5 filed.”)

6 Intervenor disputes that the petition for review was timely filed, and attaches an affidavit
7 from intervenor’s attorney to support his contention that petitioners’ attorney knew that the petition
8 for review was not “filed” within the meaning of OAR 661-010-0030(1) prior to midnight on
9 February 12, 2004.⁴ Intervenor points out that under OAR 661-010-0015, where a petitioner
10 relies on the date of certified mailing as the date of filing for a notice of intent to appeal, proof from

“* * * The [Portland] Airport Post Office is open until 2:00 a.m. every weeknight, and throughout any weekday morning, afternoon, evening and night, any person interested in using a post office can go there for full clerk assisted service.

“* * * I arrived at the Portland Airport Post Office’s counter at about 11:58 p.m. and handed the clerk my LUBA filing and my service copy to [the] City of Hood River before midnight. There was one clerk helping a man, and another man was waiting to be helped. I went to the clerk, announced to the two men I had an emergency and begged their understanding, and handed over two envelopes to the clerk, whose name is Margie. The men quickly agreed to let me go ahead[.] I asked the clerk to process the two envelopes immediately, and apologized for my rudeness. After getting the mens’ okay, she processed the envelopes for mailing.

“Although I did not see the postmark, it appears from [intervenor’s] motion that the envelope to LUBA was postmarked 13 February 2004. I am certain, however, that while it was still 12 February 2004, I deposited the envelopes with the clerk for the purpose of filing and serving the envelopes.” Affidavit of Stuart A. Sugarman, 1-2.

⁴ Intervenor’s attorney’s affidavit states, in relevant part:

“1. On February 13, 2004, [petitioners’ attorney] called me to leave a voice message, which I then had transcribed. He stated:

“I filed the [petition for review] last night; however, it got postmarked at 12:03 a.m. (meaning it should have today’s postmark on it—not yesterday’s), and therefore I am in danger of * * * having the appeal dismissed, and I was calling to see if you * * * agreed that I can have one more day. * * *”

“2. In a subsequent conversation, [petitioners’ attorney] described pleading with the postal workers to postmark the envelope for February 12, not February 13, and said something along the lines of ‘They just wouldn’t do it.’” Affidavit of Peter Livingstone 1-2.

1 the post office is required, and OAR 661-010-0015 specifies that “acceptable proof” is a “receipt
2 stamped by the United States Postal Service.”⁵ Although OAR 661-010-0015 by its terms applies
3 to notices of intent to appeal and does not apply to petitions for review, we understand intervenor to
4 argue by analogy that we should use the February 13, 2004 postmark to establish the date the
5 petition for review was filed, rather than petitioners’ attorney’s unexplained and uncorroborated
6 statement that he is “certain” that the petition for review was handed to the clerk before midnight on
7 February 12, 2004.

8 The deadline for filing the petition for review is strictly enforced. *See Terrace Lakes*
9 *Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff’d* 138 Or App 188, 906 P2d
10 871 (1995) (appeal dismissed because petition for review was filed 23 days after record was filed);
11 *Bongiovanni v. Klamath County*, 29 Or LUBA 351, 352-53 (1995) (appeal dismissed after
12 intervenor-respondent rescinded oral agreement to extend the time for filing petition for review). We
13 do not agree with intervenor that the February 13, 2004 postmark is either conclusive proof of the
14 date the petition for review was filed by mail under our rules or the only reliable evidence of the date
15 of filing. However, we agree with intervenor that petitioners have not carried their burden to
16 establish that the petition for review was filed by mail before midnight on February 12, 2004.

17 Petitioners do not claim the petition for review was filed any earlier than the time and date it
18 was handed to the post office clerk. For purposes of this opinion, we accept petitioners’ argument
19 that the petition for review was “filed,” within the meaning of OAR 661-010-0030(1), when it was
20 delivered to the post office clerk. However, the only evidence that petitioners provide to support
21 their contention that the petition for review was filed by mail before midnight on February 12, 2004

⁵ OAR 661-010-0015 provides in relevant part:

“The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice 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.*” (Emphasis added.)

1 is petitioners' attorney's affidavit. That affidavit includes two allegations of fact that bear directly on
2 the critical issue. First, he alleges that he "arrived at the Portland Airport Post Office's counter at
3 about 11:58 p.m. and handed the clerk [his] LUBA filing." Later in the affidavit, he similarly alleges
4 he is "certain * * * that while it was still 12 February 2004, [he] deposited the envelopes with the
5 clerk for the purpose of filing and serving the envelopes." *See* n 3. The difficulty with both of those
6 allegations is that they are uncorroborated and fail to state the attorney's basis for believing he
7 handed the petition for review to the post office clerk about two minutes before midnight. If he was
8 relying on his own watch, it could easily have been two minutes slow. Even if he was relying on a
9 post office clock, that clock could also have been at least two minutes slow.

10 Because OAR 661-010-0030 assigns to petitioners the burden of filing their petition for
11 review on time, petitioners are obliged to demonstrate that they carried that burden. Given the lack
12 of any explanation for why petitioners' attorney believes he handed the petition for review to the
13 post office clerk before midnight, and given the February 13, 2004 postmark, we conclude that
14 petitioners have failed to carry their burden to demonstrate that the petition for review was filed
15 before midnight on February 12, 2004.

16 Because the petition for review was not timely filed, this appeal is dismissed.