

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

3
4 KENNETH BYRTUS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BROOKINGS,
10 *Respondent.*

11
12 LUBA No. 2006-008

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Brookings.

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19 John C. Babin, Brookings, represented petitioner.

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21 John B. Trew, Coquille, represented respondent.

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23 HOLSTUN, Board Member; DAVIES, Board Chair; BASSHAM, Board Member,
24 participated in the decision.

25
26 DISMISSED

03/30/2006

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

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NATURE OF THE DECISION

Petitioner appeals a city decision denying a side-yard setback variance.

MOTION TO DISMISS

The city argues that petitioner failed to file a timely petition for review in this matter and, for that reason, moves to dismiss this appeal and seeks forfeiture of petitioner’s filing fee pursuant to OAR 661-010-0075(1)(c).¹ Petitioner opposes the motion.

Petitioner filed the notice of intent to appeal in this matter on January 25, 2006, by certified mail. Attached to LUBA’s January 27, 2006 letter acknowledging receipt of the notice of intent to appeal was a notice advising petitioner of the option to seek mediation. That notice is required by ORS 197.830(10)(b).² The notice states that mediation assistance may be obtained from the Oregon Consensus Program at Portland State University. The notice concludes with the following:

¹ OAR 661-010-0075(1)(c) provides:

“Forfeit of Filing Fee and Deposit: If a record has been filed and a petition for review is not filed within the time required by these rules, and the governing body files a cost bill pursuant to this section requesting forfeiture of the filing fee and deposit, the filing fee and deposit required by OAR 661-010-0015(4) shall be awarded to the governing body as cost of preparation of the record. See OAR 661-010-0030(1).”

² As relevant, ORS 197.830(10)(b) provides:

“Within 10 days after service of a notice of intent to appeal, the board shall provide notice to the petitioner and the respondent of their option to enter into mediation pursuant to ORS 197.860. * * *”

ORS 197.860 provides:

“All parties to an appeal may at any time prior to a final decision by the Court of Appeals under ORS 197.855 stipulate that the appeal proceeding be stayed for any period of time agreeable to the parties and the board or court to allow the parties to enter mediation. Following mediation, the board or the court may, at the request of the parties, dismiss the appeal or remand the decision to the board or the local government with specific instructions for entry of a final decision on remand. If the parties fail to agree to a stipulation for remand or dismissal through mediation within the time the appeal is stayed, the appeal shall proceed with such reasonable extension of appeal deadlines as the board or Court of Appeals considers appropriate.”

1 “A LUBA appeal will be suspended if all parties to the appeal stipulate to a
2 stay of the appeal to enter into mediation. A sample stipulated motion is
3 attached for your reference.”

4 Shortly after receiving LUBA’s January 27, 2006 letter, petitioner contacted the
5 Oregon Consensus Program. The Oregon Consensus Program in turn contacted the city’s
6 attorney who advised the Oregon Consensus Program representative that he did not know if
7 the city would agree to mediation, but that he would check and let the representative know.
8 The city’s attorney apparently did not again contact the Oregon Consensus Program.

9 The city’s community development director contacted petitioner directly to arrange a
10 meeting to determine whether a settlement might be possible to resolve this appeal and
11 petitioner’s related Ballot Measure 37 claim against the city. Petitioner, petitioner’s attorney
12 and the city community development director met to discuss this appeal and the related
13 Ballot Measure 37 claim on February 14, 2006. At the conclusion of the February 14, 2006
14 meeting, the community development director requested that petitioner’s attorney prepare a
15 letter outlining the specific settlement proposal. Petitioner’s attorney did so in a February
16 16, 2006 letter.

17 On February 14, 2006, the city mailed the record in this appeal to LUBA and served a
18 copy of the record on petitioner’s attorney. On February 16, 2006, LUBA sent a letter to the
19 parties advising them that the record had been received on February 15, 2006 and that the
20 petition for review was due 21 days after the date the record was received by LUBA.
21 Therefore, the petition for review was due March 8, 2006.

22 When petitioner did not receive a response to the February 16, 2006 letter, a number
23 of phone calls were placed to the community development director. Petitioner’s attorney was
24 able to talk to the community development director “during the first week of March, 2006.”
25 Motion to Be Relieved of Default and Request for Extension of Time to file Petition for
26 Review 3. Petitioner’s attorney states “[o]n or about March 14, 2006, I became aware from
27 another member of the City staff that a resolution might not be forthcoming as hoped for in

1 the letter.” *Id.* Petitioner’s attorney sent a letter to the city’s attorney on March 15, 2006. A
2 portion of that letter is set out below:

3 “Since I assumed that the request for a meeting was in response to my attempt
4 to mediate, I also presumed that there was an implicit agreement that no brief
5 would be due until discussions with [the city community development
6 director] had been completed. As of this date, I have not received a response
7 from [the community development director] to the [February 16, 2006] letter.

8 “Based on this chain of events, let me know if you are willing to stipulate to
9 an extension of time to allow me to file a brief on behalf of Mr. Byrtus in his
10 LUBA appeal * * *.”

11 Citing petitioner’s failure to seek the extension before the deadline for filing the
12 petition for review expired on March 8, 2006, the city attorney advised petitioner’s attorney
13 that he would not agree to the requested extension and the city moved to dismiss this appeal.

14 LUBA’s rules are very clear that the agreement of all parties is required to extend the
15 deadline for filing the petition for review.³ The deadline for filing the petition for review has
16 now expired. Petitioner’s presumption regarding an implicit agreement to extend the
17 briefing deadline notwithstanding, the city does not consent to an extension of the deadline
18 for filing the petition for review. The notice that led petitioner to seek a mediated settlement
19 in this matter clearly stated that a stipulation of the parties would be required to suspend this
20 appeal to allow additional time to explore a mediated resolution of this appeal. No such
21 stipulation has been filed. Given these circumstances, the city’s motion to dismiss must be
22 granted.

23 This appeal is dismissed. In accordance with ORS 197.830(9) and OAR 661-010-
24 0075(1)(c), the city is awarded petitioner’s filing fee and deposit for costs.

³ As relevant, OAR 661-010-0067(2) provides:

“[I]n no event shall the time limit for the filing of the petition for review be extended without
the written consent of all parties. * * *”