

NATURE OF THE DECISION

Petitioner appeals city approval of a site plan for the construction of rental warehouse facilities.

MOTION TO DISMISS

The city moves to dismiss this appeal for failure to file a timely petition for review. ORS 197.830(13)(a) provides that a petition for review must be filed within the deadlines established by our rules. The deadline for filing the petition for review is strictly enforced. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, *aff'd* 138 Or App 188, 906 P2d 871 (1995). OAR 661-010-0030(1) provides:

“Filing and Service of Petition: 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. See OAR 661-010-0025(2) and 661-010-0026(6). The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or 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. See OAR 661-010-0075(1)(c).”

Generally, it is rather simple to determine whether a petition for review has been filed within 21 days after LUBA receives the record. At the least, the dispute generally revolves around when the petition for review was filed, not when LUBA received the record. In the present case, however, there is no dispute that the petition for review was filed on May 7, 2007.

The dispute concerns the date that LUBA received the record. Petitioner argues that LUBA received the complete record no earlier than April 17, 2007, and therefore filing the petition for review 21 days later on May 7, 2007 was timely. The city, on the other hand, argues that LUBA received the record on April 11, 2007 and therefore the petition for review was filed five days too late and the appeal must be dismissed.

1 The confusion regarding the date LUBA received the record arose due to the fact that
2 in addition to the present appeal, there are also two other appeals with the same petitioner
3 and respondent. LUBA Nos. 2007-072 & 2007-082. On April 11, 2007, LUBA received the
4 record in the present appeal, LUBA No. 2007-065. Due to a typographical error by the city,
5 the cover page of that record identified it as the record in LUBA No. 2007-072. Because the
6 cover page indicated that the record was for LUBA No. 2007-072, LUBA sent a letter stating
7 that the record in LUBA No. 2007-072 had been received and that the petition for review
8 was due 21 days after receipt of that record on April 11, 2007. On April 12, 2007, LUBA
9 was alerted to the fact that the city had actually submitted the record in LUBA No. 2007-065,
10 the present appeal, and not the record in LUBA No. 2007-072. Accordingly, on April 13,
11 2007, LUBA sent the parties a letter stating that LUBA had received the record in LUBA No.
12 2007-065 on April 11, 2007, and the petition for review was due 21 days from the date of
13 LUBA’s receipt of the record.¹ On April 16, 2007, the city sent a corrected cover page to the
14 parties, and that corrected cover page was received by LUBA on April 17, 2007.

15 The city argues that the petition for review was due not later than May 2, 2007, 21
16 days after LUBA received the incorrectly identified record, and petitioner argues the petition
17 for review was due not later than May 7, 2007, 21 days after LUBA received the corrected
18 cover page. Petitioner’s entire argument assumes that the corrected cover page was a
19 supplemental record that restarted the 21-day timeline for filing the petition for review.
20 Petitioner is wrong. The corrected cover page merely indicated the proper LUBA case
21 number; it did not supplement the record in any way. Petitioner makes no argument as to
22 why the corrected cover page is a supplemental record, it merely assumes that it is. The only
23 issue petitioner raises is that OAR 661-010-0025(4)(a)(A) requires that the record “bear * * *
24 the Board’s numerical designation for the case.” While the corrected cover page corrects this

¹ LUBA also sent a letter to the parties in LUBA No. 2007-072 clarifying that the record in that appeal had not been received.

1 error, it does not render the corrected cover page a supplemental record. The corrected cover
2 page was not labeled as a supplemental record and LUBA did not treat it as a supplemental
3 record. Petitioner certainly has not demonstrated that it was a supplemental record.

4 Petitioner received a copy of the record that LUBA received on April 11, 2007. Even
5 if petitioner could plausibly argue that it was confused by the misidentified caption, any
6 confusion was eliminated by LUBA letter's dated April 13, 2007 stating that the record in the
7 present appeal, LUBA No. 2007-065, had been received by LUBA on April 11, 2007.
8 Petitioner knew that LUBA had received the record on April 11, 2007, and therefore had an
9 obligation to file the petition for review within 21 days. *See Bleu v. Clackamas County*, 52
10 Or LUBA 606, 609 (2006) (even if a petitioner does not receive a letter from LUBA stating
11 that the record is received, once a petitioner receives the record he has an obligation to file
12 the petition for review within 21 days); *Cunningham v. Josephine County*, 50 Or LUBA 58
13 (2005) (same). Because a petition for review was not filed within the time required by
14 LUBA's rules, the appeal must be dismissed.

15 This appeal is dismissed.