

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOLLY LUND, SCOTT BAKER,
5 and CAROL RODRICK,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF MOSIER,
11 *Respondent,*

12
13 and

14
15 JOHN GROUT,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2008-213

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Mosier.

24
25 Hollie Lund, Scott Baker and Carol Rodrick, Mosier, filed the petition for review and
26 represented themselves.

27
28 Daniel Kearns, Portland, filed the response brief and represented respondent. With
29 him on the brief was Reeve Kearns, PC.

30
31 John Grout, Portland, represented himself.

32
33 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
34 participated in the decision.

35
36 DISMISSED

02/12/2009

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

NATURE OF THE DECISION

Petitioners appeal the decision that the city adopted following our remand in *Lund v. City of Mosier*, ___ Or LUBA ___ (LUBA No. 2008-088, October 1, 2008). The challenged decision grants preliminary approval for a 44-lot subdivision.

MOTION TO DISMISS

The deadline for filing a petition for review is set out in OAR 661-010-0030(1), which provides in pertinent 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 * * * by the Board. * * * 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. * * *”

The record in this appeal was received by LUBA on December 11, 2008. Under OAR 661-010-0030(1) and 661-010-0075(8), the deadline for filing the petition for review expired 22 days later, on January 2, 2009.¹ There have been no extensions of that deadline. The original petition for review and the copies of the petition for review that were filed with LUBA were delivered to a Postal Annex in Hood River, Oregon on December 31, 2008. The original petition for review and the required copies were then transmitted to LUBA via United Parcel Service and they arrived at LUBA on January 5, 2009.

As we have stated on many occasions, timely filing of the petition for review is strictly enforced. *Terraces Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535 (1995) (and cases cited therein). While technical violations of our rules generally will not result in dismissal of an appeal, OAR 661-010-0005 makes it clear that untimely filing of

¹ Because the 21-day deadline set out by OAR 661-010-0030(1) fell on New Years Day, which is a recognized “state legal holiday,” the deadline expired on the “next working day,” which was January 2, 2009. OAR 661-010-0075(8).

1 the petition for review, like untimely filing of the notice of intent to appeal, is not treated as a
2 mere “technical violation[.]” of LUBA’s rules.² If the petition for review was “filed” when it
3 was delivered to the Postal Annex and United Parcel Service on December 31, 2008, it was
4 timely filed. If the petition for review was not “filed” until it was received by LUBA on
5 January 5, 2009, it was not timely filed. OAR 661-010-0030(1), quoted above, expressly
6 requires that this appeal must be dismissed if the petition for review was not timely filed.
7 The city argues that the petition for review was not “filed” until it was received by LUBA
8 and that this appeal must be dismissed. As explained below, we agree with the city and
9 dismiss this appeal.

10 The date of filing is governed by OAR 661-010-0075(2)(a):

11 “[F]iling a document with the Board is accomplished by:

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

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

15 “(C) Documents may not be filed by facsimile. * * *”

16 Under OAR 661-010-0075(2)(a), a petition for review is filed with LUBA on the date it is
17 mailed “by first class mail with the United States Postal Service.” If the petition for review
18 is filed with LUBA in any other manner, the petition for review is filed on the date it is
19 delivered to LUBA. Because the petition for review was not sent to LUBA via “first class

² OAR 661-010-0005 provides:

“[LUBA’s] rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. *Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation.*” (Emphasis added.)

1 mail with the United States Postal Service” it was filed on the date it was received by LUBA,
2 or January 5, 2009. The petition for review was not timely filed.

3 Petitioner Lund offers the following explanation:

4 “As Lead Petitioner, I delivered all three packages containing the Petition for
5 Review to the Postal Annex in Hood River, Oregon on December 31, 2008
6 and asked that they be bound and mailed via first class mail. * * * The Postal
7 Annex suggested that I mail the larger package (with the original document)
8 via UPS because they could provide me with a tracking number. I was also
9 informed that the package would arrive one day earlier than if shipped via
10 USPS first class mail. I asked if this service was considered ‘registered mail’
11 and was told that it was. Based on this information, I (regretfully) chose to
12 send the package with the original and four copies of the petition using the
13 UPS tracking service. * * *

14 “I understand that failure to meet the timeline for filing a Petition for Review
15 is not a technical violation and may result in dismissal of this case. However,
16 I hope that you can take into consideration that I made a good faith effort to
17 ensure that this timeline was met and sincerely believed that I was following
18 LUBA Rules of Procedure at the time of filing. * * * Lead Petitioner’s Letter
19 dated January 12, 2009.

20 We do not question lead petitioner’s good faith. Assuming that lead petitioner’s
21 description of her conversation with Postal Annex is accurate, it is unfortunate that Postal
22 Annex feels free to give advice about how best to file appeal documents at LUBA. It was
23 bad advice, and it is unfortunate that the *pro se* lead petitioner in this appeal took that advice.
24 However, in *Doob v. Josephine County*, 43 Or LUBA 473, 475-76 (2003), we dismissed an
25 appeal in nearly identical circumstances, and we do so in this appeal for the same reasons.
26 The date of filing is controlled by OAR 661-010-0075(2)(a). OAR 661-010-0030(1) both
27 makes timely filing of the petition for review a mandatory requirement and specifies that
28 dismissal is consequence for untimely filing. Those rules control and require that this appeal
29 dismissed.

30 This appeal is dismissed.