

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CHRISTOPHER CANFIELD,  
5 *Petitioner,*

6  
7 vs.

8  
9 LANE COUNTY,  
10 *Respondent,*

11 and

12  
13 MICHAEL COWAN and  
14 SHADOWBROOK, INC.,  
15 *Intervenors-Respondents.*

16  
17 LUBA No. 2009-057

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Lane County.

23  
24 Christopher Canfield, Cottage Grove, filed the petition for review on his own behalf.

25  
26 Stephen L. Vorhes, Assistant County Counsel, Eugene, represented respondent.

27  
28 Matthew J. Cox and Mary Bridget Smith, Springfield, filed the response brief and  
29 represented intervenors-respondents.

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

33  
34 DISMISSED

35 09/23/2009

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

**NATURE OF THE DECISION**

Petitioner appeals a county decision that approves a forest template dwelling.

**INTRODUCTION**

On July 22, 2009, LUBA issued an order settling the record in this appeal and establishing a briefing schedule. Pursuant to that order and OAR 661-010-0026(6), the deadline for filing the petition for review expired on August 12, 2009.

On August 12, 2009, petitioner transmitted the original petition for review and the required number of copies to LUBA via Federal Express. LUBA received the petition for review the next day, August 13, 2009. Nineteen days later, on September 2, 2009, intervenors-respondents filed their response brief and a motion to dismiss. In that September 2, 2009 motion to dismiss, intervenors-respondents contend the petition for review was not *filed* until it was received by LUBA on August 13, 2009 and was therefore filed one day late. We issued an order on September 9, 2009 cancelling oral argument and allowing petitioner an opportunity to file a written response to the motion to dismiss.

**MOTION TO DISMISS**

The deadline for filing a petition for review is set out at OAR 661-010-0030(1), which provides in part:

“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). \* \* \* 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).”

As noted above, the record was settled on July 22, 2009, and the deadline for filing the petition for review was established when the record was settled. There was no request to extend that August 12, 2009 deadline under OAR 661-010-0045(9) or OAR 661-010-

1 0067(2). Therefore, under OAR 661-010-0030(1), the deadline to file the petition for review  
2 expired on August 12, 2009. The question becomes whether the petition for review was  
3 “filed” on August 12, 2009 when the petition for review was given to Federal Express or was  
4 “filed” on August 13, 2009 when the petition for review was received by LUBA. That  
5 question is answered by OAR 661-010-0075(2)(a), which provides:

6 “[F]iling a document with [LUBA] is accomplished by:

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

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

10 “(C) Documents may not be filed by facsimile. Documents that are filed by  
11 delivery or mailing may include facsimile signatures.”

12 Because the petition for review was not filed “by first class mail with the United States  
13 Postal Service,” it was not filed on August 12, 2009 when the petition for review was  
14 delivered to the Federal Express office. The petition for review was “filed,” within the  
15 meaning of OAR 661-010-0030(1), when it was delivered to LUBA by Federal Express on  
16 August 13, 2009. OAR 661-010-0075(2)(a)(A). *See Doob v. Josephine County*, 43 Or  
17 LUBA 473, 475-76 (2003) (petition for review sent to LUBA via United Parcel Service on  
18 the day the deadline expired was not timely filed, where the petition for review was not  
19 received by LUBA until three days later). The petition for review was filed on August 13,  
20 2009, one day late. Although some deadlines are not strictly enforced at LUBA, the OAR  
21 661-010-0015(1)(a) and 661-010-0030(1) deadlines for filing the notice of intent to appeal  
22 and the petition for review are strictly enforced.<sup>1</sup> OAR 661-010-0005 makes it clear that

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<sup>1</sup> The text of OAR 661-010-0030(1) was set out earlier. As relevant, the text of OAR 661-010-0015(1)(a) provides:

“The Notice, \* \* \* 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.”

1 unlike other violations of LUBA's rules which can be overlooked as mere technical  
2 violations, these two deadlines are different.<sup>2</sup> Intervenors-respondents argue LUBA should  
3 enforce the OAR 661-010-0031(1) deadline and move to dismiss this appeal.

4 **PETITIONER'S RESPONSE**

5 Petitioner argues he originally intended to file the petition for review via first class  
6 mail, but at a Federal Express representative's suggestion he decided to send the petition for  
7 review to LUBA via Federal Express. Petitioner concedes the petition for review was filed  
8 one-day late under LUBA's rules and our decision in *Doob*. However, petitioner contends  
9 his error was harmless and almost certainly resulted in the petition for review arriving at  
10 LUBA sooner than it would have arrived if it had been mailed via first class mail at midnight  
11 on the last possible day, as LUBA's rules permit. We also understand petitioner to argue he  
12 could not have filed his 15.9 ounce petition for review with required copies (totaling 5.6  
13 pounds) by first class mail:

14 “\* \* \* But the United States Postal Service limits First-Class Mail to 13  
15 ounces; anything heavier must be sent via Priority Mail with delivery  
16 promised in 2-3 days (see attached Exhibit B for USPS description based  
17 upon postal regulations adopted after the LUBA rule). Therefore no petition  
18 [for review] weighing more than 13 ounces (with packaging) can be filed  
19 under OAR 661-010-0075(2)(a)(B) as written; and even a 12-ounce petition  
20 would have to be filed in five packages to meet the requirement to file one  
21 original and four copies.” Petitioner's Response to Intervenor-Respondent's  
22 Motion to Dismiss, un-numbered page 5.

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<sup>2</sup> OAR 661-010-0005:

“These 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 661-010-0030(1) is not a technical violation.*” (Emphasis added.)

1 Taking petitioner's last point first, the United State Postal Service description  
2 attached to petitioner's response as Exhibit B expressly provides that "**First Class Mail**  
3 **includes: \* \* \* Priority Mail \* \* \***." (Bold lettering and underlining in original). If petitioner  
4 had mailed his petition for review and the required copies via priority mail, they would have  
5 been mailed by first class mail and would have been filed on the date they were given to the  
6 United States Postal Service.

7 Turning next to petitioner's harmless error argument, we recently dismissed an  
8 appeal, in circumstances that were very similar to the circumstances presented in this appeal.  
9 *Lund v. City of Mosier*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2008-213, February 12, 2009). In  
10 *Lund*, the deadline for filing the petition for review was January 2, 2009 and petitioner  
11 transmitted the petition for review to LUBA on December 31, 2008 via United Parcel  
12 Service, based on a suggestion by an employee of the local office of the Postal Annex that  
13 United Parcel Service would be a better way to transmit the petition for review to LUBA.  
14 The petition for review did not arrive at LUBA until January 5, 2009. In dismissing the  
15 appeal in *Lund*, we acknowledged that petitioner's decision to send the petition for review to  
16 LUBA via UPS was a good faith mistake:

17 "We do not question lead petitioner's good faith. Assuming that lead  
18 petitioner's description of her conversation with Postal Annex is accurate, it is  
19 unfortunate that Postal Annex feels free to give advice about how best to file  
20 appeal documents at LUBA. It was bad advice, and it is unfortunate that the  
21 *pro se* lead petitioner in this appeal took that advice. However, in *Doob v.*  
22 *Josephine County*, 43 Or LUBA 473, 475-76 (2003), we dismissed an appeal  
23 in nearly identical circumstances, and we do so in this appeal for the same  
24 reasons. The date of filing is controlled by OAR 661-010-0075(2)(a). OAR  
25 661-010-0030(1) both makes timely filing of the petition for review a  
26 mandatory requirement and specifies that dismissal is the consequence for  
27 untimely filing. Those rules control and require that this appeal dismissed."  
28 *Id.* slip op at 4.

29 In *Doob*, we similarly acknowledged that petitioner's decision to send the petition for review  
30 to LUBA via United Parcel Service likely caused no delay in delivery of the petition for  
31 review to LUBA:

1           “The printing problem that petitioner encountered is regrettable, and petitioner  
2           made a significant effort to ensure speedy delivery of the petition for review  
3           to LUBA. Petitioner is undoubtedly correct that the petition for review would  
4           not have gotten to LUBA any sooner had petitioner actually mailed the  
5           petition for review by first class mail at the end of the day on Friday,  
6           November 22, 2002. However, OAR 661-010-0030(1) makes ‘filing’ of the  
7           petition for review on or before the deadline mandatory and specifies  
8           dismissal as the consequence for failure to timely file the petition for review.  
9           It is ‘filing,’ as described in our rules, that must be timely. Under OAR 661-  
10           010-0075(2)(a)(A), the date of filing is the date the petition for review is  
11           actually delivered to LUBA. Under OAR 661-010-0075(2)(B), if the petition  
12           for review is sent by ‘first class mail with the United States Postal Service,’  
13           the date of filing is the date of mailing rather than the date the petition for  
14           review is actually delivered to LUBA by the United States Postal Service. If  
15           the petition for review is filed with LUBA in any way other than by ‘first  
16           class mail with the United States Postal Service,’ OAR 661-010-0075(a)(A)  
17           applies and the date the petition for review is actually delivered to LUBA is  
18           the date of filing.” 43 Or LUBA at 475-76.

19           The petition for review was not filed via first class mail with the United States Postal  
20           Service. Therefore, OAR 661-010-0075(a)(A) applies, and the date the petition for review  
21           was actually delivered to LUBA was the date of filing. Because the petition for review was  
22           filed one day late, this appeal must be dismissed.

23           Petitioner also argues that LUBA should deny the motion to dismiss because the  
24           motion to dismiss was not filed within 10 days after the petition for review was served on  
25           intervenor-respondent, as required by OAR 661-010-0065(2).<sup>3</sup> But OAR 661-010-0065(2)  
26           expressly provides that “motions to dismiss for lack of jurisdiction may be filed at any  
27           time.”<sup>4</sup> Because ORS 197.830(11) requires that a petition for review “shall be filed with

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<sup>3</sup> OAR 661-010-0065(2) provides, in part:

“Time of Filing: A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on all parties within 10 days after the moving party obtains knowledge of such alleged failure. However, motions to dismiss for lack of jurisdiction may be filed at any time. An opposing party may, within 14 days from the date of service of a motion, file a response.”

<sup>4</sup> The quoted language from OAR 661-010-0065(2) was added to OAR 661-010-0065(2) in 1998 to codify pre-existing LUBA case law. *No Casino Association v. City of Lincoln City*, 30 Or LUBA 79, 82 (1995)

1 [LUBA] as required by the board” and OAR 661-010-0030(1) requires that LUBA dismiss  
2 an appeal if the petition for review is not timely filed, we believe a motion to dismiss based  
3 on a petitioner’s failure to file a timely petition for review is properly viewed as raising a  
4 *jurisdictional* question. For that reason, intervenors-respondents’ motion to dismiss is not  
5 subject to the OAR 661-010-0065(2) ten-day rule.<sup>5</sup>

6 Even if the question raised by intervenors-respondents’ motion to dismiss is not a  
7 *jurisdictional* question, OAR 661-010-0030(1) specifies that dismissal is the consequence for  
8 filing an untimely petition for review, and OAR 661-010-0005 makes it clear that such a  
9 failure may not be overlooked as a mere “technical violation” of LUBA’s rules. Together,  
10 OAR 661-010-0005 and OAR 661-010-0030(1) therefore establish that even if timely filing  
11 of the petition for review does not amount to a “jurisdictional” requirement, those rules do  
12 establish that failure to file a petition for review before the filing deadline expires is  
13 nevertheless a compulsory non-jurisdictional basis for dismissing an appeal. *See Ray v.*  
14 *Douglas County*, 140 Or App 24, 28, 914 P2d 26 (1996) (“it is a truism that courts and  
15 agencies may have discretionary or even compulsory non-jurisdictional bases for dismissing  
16 proceedings”). LUBA has long interpreted and applied OAR 661-010-0030(1) to compel  
17 dismissal of an appeal where the petition for review is not timely filed. *Terrace Lakes*  
18 *Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff’d* 138 Or App 188, 906 P2d  
19 871 (1995); *Bongiovanni v. Klamath County*, 29 Or LUBA 351, 352-53 (1995); *Hutmacher*  
20 *v. Marion County*, 15 Or LUBA 514, 515 (1987). As we noted, LUBA never interpreted the  
21 10-day rule in OAR 661-010-0065(2) to apply to challenges to LUBA’s jurisdiction. *See n*

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(jurisdictional challenge is not subject to the 10-day rule in OAR 661-010-0065(2)); *Elliott v. Lane County*, 18 Or LUBA 871, 874 (1990) (same); *Standard Insurance Co. v. City of Hillsboro*, 17 Or LUBA 886, 890 n 3 (1989); *Osborne v. Lane County*, 4 Or LUBA 368, 369 (1981).

<sup>5</sup> Although the parties do not address the question, we do not necessarily agree that petitioner’s failure to discover that the petition for review was not timely filed until September 2, 2009 necessarily violates the OAR 661-010-0065(2) 10-day rule. While it would seem that a check to ensure the petition for review was timely filed would be an item at the top of a responding party’s check list, work load and other considerations could result in some reasonable period of delay in discovering the petition for review was not timely filed.

1 4. Similarly, LUBA does not interpret that 10-day rule to preclude consideration of motions  
2 that assert that an appeal must be dismissed based on a failure to comply with OAR 661-010-  
3 0030(1), which mandates dismissal as the consequence for a failure to file the petition for  
4 review before the filing deadline expires.

5 For the reasons explained above, this appeal is dismissed.