

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

PAUL T. CONTE,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2024-096

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Charles W. Woodward, IV represented petitioner.

Lauren A. Sommers represented respondent.

ZAMUDIO, Board Chair; RUDD, Board Member; WILSON, Board
Member, participated in the decision.

DISMISSED

03/19/2025

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

NATURE OF THE DECISION

Petitioner appeals Ordinance 20716, which approves amendments to the Eugene-Springfield Metropolitan Area General Plan and Eugene Code related to middle housing.

MOTION TO TAKE EVIDENCE

The city moves that we take the following evidence not in the record: (1) a letter from LUBA regarding briefing schedule, dated January 16, 2025; (2) a hard copy of the petition for review received by the city on February 7, 2025; (3) an email from petitioner's attorney, dated February 7, 2025, and attached copy of petition for review; (4) an affidavit of the city attorney; and (5) emails between petitioner's attorney and the city attorney, dated February 19, 2025. City's Motion to Take Evidence 1.

Our review is generally limited to the record that was before the local government. ORS 197.835(2)(a). We may take evidence not in the record where there are

“disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.” OAR 661-010-0045(1) (implementing ORS 197.835(2)(b)).

1 On February 20, 2025, the city filed a motion to dismiss the appeal based
2 on petitioner's failure to timely file the petition for review. The city argues that
3 we should accept the extra-record evidence because it supports the facts set out
4 in the city's motion to dismiss concerning the timing of the filing of the petition
5 for review. However, petitioner does not dispute any of the factual allegations in
6 the city's motion to dismiss. Accordingly, there are no disputed factual
7 allegations that would require the city to provide evidence outside of the record
8 to establish a disputed fact. For purposes of resolving the motion to dismiss, we
9 accept as true the undisputed factual statements in the city's motion to dismiss.

10 The city's motion to take evidence not in the record is denied.

11 **MOTION TO TAKE OFFICIAL NOTICE**

12 We may take official notice of relevant law as defined in ORS 40.090.
13 OAR 661-010-0046(1). The city moves that we take official notice of LUBA's
14 Permanent Administrative Order, LUBA 1-2025, filed January 7, 2025, as a
15 public act. ORS 40.090(2). The city explains that the Permanent Administrative
16 Order is relevant to the city's motion to dismiss because it establishes the correct
17 address for filing documents at LUBA, and that, after December 31, 2024, LUBA
18 would not accept filings addressed and mailed to LUBA's previous address.
19 Petitioner does not oppose the motion.

20 The city's motion to take official notice is allowed.

1 **CITY’S MOTION TO DISMISS AND PETITIONER’S MOTION FOR**
2 ***NUNC PRO TUNC* FILING OF PETITION FOR REVIEW**

3 The material facts are undisputed. Filing a document with LUBA is
4 accomplished by mail or commercial delivery. OAR 661-010-0075(2)(a)(B). At
5 all material times, LUBA’s mailing address for receiving filings was and is 201
6 High Street SE, Suite 600, Salem, Oregon 97301-3398. OAR 661-010-0075(7).
7 Prior to November 1, 2024, LUBA’s mailing address for receiving filings was
8 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283. Effective
9 November 1, 2024, LUBA amended its rules to reflect the changed filing address
10 and provided that LUBA would accept documents filed by mail at either address
11 until December 31, 2024. OAR 661-010-0075(7) (Nov 1, 2024) provided:

12 “Address and Hours of the Board: Until October 31, 2024, the
13 Board’s address is 775 Summer Street NE, Suite 330, Salem
14 Oregon, 97301-1283. Effective November 1, 2024, the Board’s
15 address is 201 High Street, SE, Suite 600, Salem Oregon, 97301-
16 3398. Effective November 1, 2024, pleadings filed by commercial
17 delivery service will only be accepted at 201 High Street SE, Suite
18 600, Salem, Oregon, 97301-3398. Until December 31, 2024, the
19 Board will accept as correctly addressed pleadings filed by first class
20 or certified mail that are addressed to either location. * * *.”

21 The petition for review in this appeal was due on February 5, 2025. On
22 February 5, 2025, petitioner mailed a copy of the petition for review to LUBA’s
23 former address. On February 7, 2025, the city received a hard copy of the petition
24 for review through USPS Mail. That same date, petitioner’s attorney emailed the
25 city a courtesy copy of the petition for review. On February 18, 2025, USPS

1 returned to petitioner the envelope containing the petition for review addressed
2 to LUBA's former address. On February 19, 2025, petitioner mailed a copy of
3 the petition for review to LUBA at the current filing address.

4 On February 21, 2025, LUBA received the city's motion to dismiss,
5 petitioner's petition for review, and petitioner's motion requesting that we accept
6 the petition for review *nunc pro tunc* as filed on February 5, 2025.¹ Petitioner
7 argues that LUBA should consider the petition for review timely filed on
8 February 5, 2025, because the incorrectly addressed envelope was "merely an
9 inadvertent clerical error." Petitioner's Motion for *Nunc Pro Tunc* Filing of
10 Petition for Review 1. Petitioner argues that petitioner's error is a technical error
11 that did not prejudice the city's substantial rights because the city was timely
12 served a copy of the petition for review on February 5, 2025.

13 On March 6, 2025, petitioner filed a response to the city's motion to
14 dismiss in which petitioner contends that, notwithstanding that the petition for
15 review was mailed to an incorrect address, the petition for review was
16 nevertheless "filed" on February 5, 2025 because it was "properly mailed
17 (certified and return receipt requested—as required) to LUBA." Response 1.

¹ "*Nunc pro tunc*" is a Latin phrase meaning "now for then" and it describes a tribunal giving retroactive legal effect to correct a clerical error and proceeding as though an erroneously belated action had occurred at an earlier intended date.

1 ORS 197.830(11) and (13) require that a petition for review be filed within
2 the deadlines established by LUBA's rules. OAR 661-010-0030(1) provides, in
3 part:

4 “Unless the Board orders otherwise pursuant to ORS
5 197.830(10)(a), the petition for review shall be filed with the Board
6 within 21 days after the date the record is received or settled by the
7 Board. See OAR 661-010-0025(2) and 661-010-0026(6). The
8 petition shall also be served on the governing body and any party
9 who has filed a motion to intervene. *Failure to file a petition for*
10 *review within the time required by this section, and any extensions*
11 *of that time under OAR 661-010-0045(9) or 661-010-0067(2), shall*
12 *result in dismissal of the appeal[.]”* (Emphasis added.)

13 The city was not required to establish any prejudice. Timely *service* of a
14 petition for review does not excuse or cure late *filing* of a petition for review.
15 Late filing of a petition for review is not a technical violation. See OAR 661-010-
16 0005 (“Technical violations not affecting the substantial rights of parties shall
17 not interfere with the review of a land use decision or limited land use decision.
18 Failure to comply with the time limit for filing a notice of intent to appeal under
19 OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is
20 not a technical violation.”). Failure to file a petition for review within the time
21 required by OAR 661-010-0030(1) or any extensions of that time under OAR
22 661-010-0067(2) shall result in dismissal of the appeal. OAR 661-010-0030(1);
23 *Towey v. City of Hood River*, LUBA No 2021-057 (Mar 21, 2022), *aff'd*, 321 Or
24 App 414, 516 P3d 738 (2022); *Terrace Lakes Homeowners Assoc. v. City of*
25 *Salem*, 29 Or LUBA 532, 535, *aff'd* 138 Or App 188, 906 P2d 871 (1995).

1 A notice of intent to appeal is considered filed on the date it is mailed by
2 certified mail to LUBA, “if it is placed in an envelope that is addressed to LUBA
3 at the address set forth in LUBA’s rules and mailed to that address.” *Bartlett v.*
4 *City of Portland*, 72 Or LUBA 408, 410 (2015), *aff’d*, 276 Or App 919, 370 P3d
5 565 (2016). Similarly, a petition for review is filed on the date that it is mailed to
6 LUBA only if it is placed in an envelope that is addressed to LUBA at the address
7 set forth in LUBA’s rules and mailed to that address.

8 Since November 1, 2024, OAR 661-010-0075(7) has provided that
9 LUBA’s address is 201 High Street SE, Suite 600, Salem, Oregon, 97301-3398.
10 Our prior rule provided a transition period during which we accepted filings
11 mailed to either address. OAR 661-010-0075(7) (Nov 1, 2024). That period
12 ended on December 31, 2024. *Id.* The petition for review was not timely filed
13 because petitioner did not timely mail the petition for review to the address set
14 forth in OAR 661-010-0075(7). The petition for review was filed on February 19,
15 2025. Petitioner’s motion for LUBA to accept the petition for review *nunc pro*
16 *tunc* as timely filed on February 5, 2025 is denied.

17 The city’s motion to dismiss is granted.

18 This appeal is dismissed.