

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 ROBERT MASON,  
5 *Petitioner,*  
6

7 vs.  
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9 CITY OF CORVALLIS,  
10 *Respondent,*  
11

12 and  
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14 PAHLISCH HOMES INC.,  
15 *Intervenor-Respondent.*  
16

17 LUBA No. 2004-152

18 ORDER ON MOTION TO DISMISS

19 The city and intervenor-respondent (together, respondents) move to dismiss this  
20 appeal pursuant to OAR 661-010-0030(1), on the grounds that petitioner filed the petition for  
21 review with LUBA one day late.<sup>1</sup>

22 The petition for review was due on January 11, 2005. LUBA received the petition for  
23 review on January 13, 2005, in an envelope postmarked January 12, 2005. The certificate of  
24 filing that accompanies the petition for review states that petitioner filed the petition for  
25 review by mail on January 11, 2005. OAR 661-010-0075(2)(a)(B) provides that filing a  
26 document, including the petition for review, is accomplished by “[m]ailing on or before the

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<sup>1</sup> 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).”

1 date due by first class mail with the United States Postal Service.”<sup>2</sup> Petitioner asserts,  
2 supported by an affidavit, that her attorney mailed the petition for review on January 11,  
3 2005, by placing it postage-paid within a post office deposit box at 11:55 p.m. on that date.<sup>3</sup>

4 Respondents argue that placing the petition for review within a post office deposit  
5 box is insufficient to “mail” and hence to file the petition within the meaning of OAR 661-  
6 010-0075(2)(a)(B). According to respondents, the date the petition for review was “mailed”  
7 for purposes of the rule is the date it was postmarked by the post office, January 12, 2005.  
8 Respondents argue that LUBA has previously held in two unpublished opinions that under  
9 OAR 661-010-0075(2)(a)(B) “a petition for review is deemed filed on the date it is  
10 postmarked.” *Martin v. Clackamas County*, \_\_ Or LUBA \_\_ (LUBA No. 95-259, April 24,  
11 1996) slip op 2, n 1, and *Wolfe v. Clackamas County*, \_\_ Or LUBA \_\_ (LUBA No. 96-038,  
12 April 24, 1996), slip op 2, n 1.

13 Respondents anticipate that petitioner may cite to *Bollinger v. City of Hood River*, 46  
14 Or LUBA 602 (2004), for the proposition that placing the petition for review into the hands

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<sup>2</sup> OAR 661-010-0075(2)(a) provides, in relevant part:

“Except as provided in OAR 661-010-0015(1)(b) with regard to the notice of intent to appeal, and as provided in OAR 661-010-0021(5)(b) with regard to a refiled original notice of intent to appeal or an amended notice of intent to appeal, filing a document with the Board is accomplished by:

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

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

<sup>3</sup> Petitioner’s attorney states:

“The briefs were finished after 11:30 p.m. I realized that it might very well be too late to drive them to the airport post office, if they were to be mailed on January 11, so I weighed them, placed them in envelopes, stamped each package with first class postage, drove to the Hoyt Street branch of the post office, and deposited the filing and service copies in a mailbox there, at approximately 11:55 p.m. on January 11, 2005. Because I was extremely aware of the need to mail the brief on January 11 rather than January 12, I checked the clock in my car as I drove to the post office and just after I mailed the briefs, and noted the time. I set the clock according to time announcements on the radio, and it is generally accurate.” Affidavit of Christine M. Cook in Opposition to Joint Motion to Dismiss 2.

1 or control of the post office is sufficient to “mail” the petition. In *Bollinger*, the petitioner’s  
2 attorney claimed that he handed the petition for review to the postal clerk at 11:58 p.m. on the  
3 date the brief was due, but the post office did not process the petition or postmark it until  
4 after midnight. The petitioner argued that filing was effective once the petition was handed  
5 to the postal clerk, while the intervenor-respondent in that case argued that the postmark was  
6 conclusive proof that the petition was “mailed” after midnight. We assumed for purposes of  
7 our opinion that a petition for review was “filed” within the meaning of OAR 661-010-  
8 0030(1) when it was delivered to the post office clerk. 46 Or LUBA at 606. However, we  
9 ultimately dismissed the appeal because petitioner, who had the burden of proof, failed to  
10 demonstrate that he in fact handed the petition to the post office clerk prior to midnight. *Id.*

11 Respondents argue that the assumption we entertained in *Bollinger* is contrary to our  
12 conclusions in *Martin* and *Wolfe*, that the date the petition for review is filed is the date it is  
13 postmarked. In any case, respondents argue, *Bollinger* is distinguishable, as it involved a  
14 petitioner physically handing the brief to a postal clerk during regular business hours,  
15 whereas the present case involves placing the petition into a postal deposit box at a post  
16 office that was closed at the time. Respondents note that the latest collection time for the  
17 deposit box that petitioner used is 9:00 p.m. According to respondents, placing a brief into a  
18 deposit box that will not be collected until the following day is insufficient to “mail” or file  
19 that brief on the date it is placed into the deposit box, for purposes of OAR 661-010-  
20 0075(2)(a)(B) and 661-010-0030(1).

21 Petitioner responds that, unlike OAR 661-010-0015(1)(b), which governs filing of the  
22 notice of intent to appeal by mail, neither OAR 661-010-0030(1) nor 661-010-0075(2)(a)  
23 requires the petitioner to provide a postmark or other proof from the post office to establish  
24 that the petition was filed on or before the due date.<sup>4</sup> Had LUBA wanted to impose a similar

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<sup>4</sup> OAR 661-010-0015(1)(b) provides, in relevant part:

1 requirement for filing petitions for review as it did for filing notices of intent to appeal,  
2 petitioner argues, it could have done so. Instead, LUBA chose to require only that the  
3 petitioner submit a certificate “showing the date of filing with the Board (see Exhibit 5).”  
4 OAR 661-010-0075(2)(b)(C). Exhibit 5 is an example of the certificate required by  
5 OAR 661-010-0075(2)(b)(C), which requires, in relevant part, that the party certify that on a  
6 specified date the party filed the document with LUBA by first class mail or personal  
7 delivery. Petitioner argues that the certificate of filing, indicating that the petition for review  
8 was mailed on January 11, 2005, as supported by the affidavit of her attorney, is sufficient to  
9 establish that the petition for review was “mail[ed] on or before the date due by first class  
10 mail” within the meaning of OAR 661-010-0075(2)(a)(B).

11 With respect to *Martin* and *Wolfe*, cited by respondents, petitioner argues that the  
12 language respondents rely upon is *dicta*, based on footnotes in two brief unpublished  
13 opinions in which the time of mailing was not at issue. With respect to *Bollinger*, petitioner  
14 contends that, in contrast to the present case, the attorney in *Bollinger* failed to establish the  
15 basis for his belief that he handed the petition for review to the postal clerk prior to midnight  
16 on the day it was due. Here, petitioner argues, the affidavit of petitioner’s attorney  
17 sufficiently states the basis for the attorney’s belief that the petition was mailed or placed into  
18 the custody of the postal service prior to midnight.

19 In *Bollinger*, we rejected an argument that the postmark is the only conclusive or  
20 reliable proof of the date a petition for review is filed. 46 Or LUBA at 605-06. We erred to  
21 the extent we suggested that the postmark is determinative in *Martin* and *Wolfe*. As  
22 respondents note, in *Bollinger* we assumed for purposes of that opinion that delivering the

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“The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number. \* \* \*”

1 petition to the postal clerk prior to midnight on the day it was due was sufficient to “mail” or  
2 file the petition on that date, under OAR 661-010-0030(1) and 661-010-0075(2)(a)(B). The  
3 disposition of *Bollinger* turned on the petitioner’s failure to prove that the petition was in fact  
4 delivered to the postal clerk prior to midnight. The present case requires us to squarely  
5 address the issue we avoided in *Bollinger*.

6 Our rules do not define what constitutes “[m]ailing on or before the date due” for  
7 purposes of OAR 661-010-0075(2)(a)(B). However, in a case the parties do not cite to us  
8 (and that we did not consider in *Bollinger*), we held that depositing the petition for review  
9 postage paid in a postal service deposit box is sufficient to “mail” and hence to file the  
10 petition with LUBA, under OAR 661-10-075(5)(B), the identically-worded predecessor to  
11 OAR 661-010-0075(2)(a)(B). *Greenwood v. Polk County*, 11 Or LUBA 408, 409 (1984).  
12 The relevant facts in *Greenwood* are very similar to the facts in this case: the petitioner  
13 deposited the petition for review in a postal service deposit box on the date it was due, but the  
14 petition was post-marked the day after. We stated, after quoting OAR 661-10-075(5)(B):

15 “Depositing with the U.S. Postal Service, then, is a filing under LUBA rules,  
16 and therefore depositing a petition for review in the U.S. mail within the time  
17 allowed by LUBA rules for filing a petition is sufficient. We recognize mail is  
18 not picked up from postal service deposit boxes and time stamped  
19 immediately after being placed in a mail deposit box. Further, our rules do not  
20 place particular reliance upon date stamps appearing on envelopes. The  
21 critical issue is the date the documents were deposited in the U.S. mail.

22 “The only information before us on this issue is the affidavit of attorney for  
23 petitioner reciting the petition was deposited in the U.S. mail on March 20,  
24 1984. This was within the time to file a petition under LUBA rules. Moving  
25 respondents have presented no evidence on this issue. There is no basis  
26 therefore to sustain the motion [to dismiss].” *Id.* at 409.

27 Under *Greenwood*, it is the date on which the petition is “deposited” with the postal  
28 service that is critical in determining what date it was “mailed,” for purposes of OAR 661-  
29 010-0075(2)(a)(B) and OAR 661-010-0030(1). *Greenwood* did not discuss whether the  
30 petition was deposited prior to the last collection time for that particular deposit box;

1 however, we do not see that the schedule by which the postal service collects mail from  
2 deposit boxes is significant. Rather it is the “date,” the 24-hour period from midnight to  
3 midnight, on which the petition is deposited with the postal service that is significant.

4 Respondents do not dispute that petitioner’s attorney in fact deposited the petition for  
5 review postage paid with the postal service prior to midnight on the date it was due, as stated  
6 in the affidavit of petitioner’s counsel. Those undisputed facts are sufficient to establish that  
7 the petition for review was timely filed, under *Greenwood* and OAR 661-010-0075(2)(a)(B).  
8 The motion to dismiss is denied.

9 The response brief is due 21 days from the date of this order. The Board’s final order  
10 and opinion is due 56 days from the date of this order.

11 Dated this 10th day of February, 2005.

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Tod A. Bassham  
Board Member