

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

3  
4 MARK BYBEE,  
5 *Petitioner,*

6  
7 vs.

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9 CITY OF SALEM,  
10 *Respondent,*

11 and

12  
13  
14 PETER COURTNEY,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2001-065

18  
19 FINAL OPINION  
20 AND ORDER

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22 Appeal from City of Salem.

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24 Mark Bybee, Salem, represented himself.

25  
26 Paul A. Lee, Salem, represented respondent.

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28 Peter Courtney, Salem, represented himself.

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30 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,  
31 participated in the decision.

32  
33 DISMISSED

06/13/2001

34  
35 You are entitled to judicial review of this Order. Judicial review is governed by the  
36 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner appeals a city planning commission decision denying his appeal of a hearings officer’s approval of a conditional use permit. The permit approves, with conditions, petitioner’s application for residential improvements on property within the Willamette Greenway.

**MOTION TO INTERVENE**

Peter Courtney moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**MOTION TO DISMISS**

The city moves to dismiss this appeal on the grounds that petitioner failed to file the petition for review within 21 days of the date the record was received, as required by OAR 661-010-0030(1).<sup>1</sup>

The Board received the record on April 24, 2001. On April 25, 2001, the Board sent the parties, including petitioner, a form letter that states in relevant part:

“We are in receipt of the record transmittal for the above-captioned appeal. We will refer to the Board’s Procedural Rules for the calculation of the briefing schedule.

“The petition for review is due twenty-one days after receipt of the record by the Board. The respondent’s brief is due forty-two days after receipt of the record. The record was received by the Board on .”

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<sup>1</sup>OAR 661-010-0030(1) provides:

“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)”

1 Due to staff error, the last sentence of the Board’s letter did not provide the date the record  
2 was received. As calculated by the Board’s rules, the petition for review was due on May 15,  
3 2001. Petitioner did not file a petition for review on or before that date or at any time  
4 thereafter. On May 21, 2001, the city filed this motion to dismiss, accompanied by a cost bill  
5 and a request that petitioner forfeit the filing fee and deposit for costs, pursuant to OAR 661-  
6 010-0075(1)(c).<sup>2</sup>

7 Petitioner responds that no obligation to file the petition for review exists until the  
8 Board conveys a record transmittal date to petitioner. According to petitioner, the omission  
9 in the Board’s April 25, 2001 letter affected his substantial rights to due process. Petitioner  
10 moves that the Board convey a conclusive record transmittal date to petitioner, and that the  
11 Board extend the time for filing the petition for review based on the conclusive record  
12 transmittal date.

13 The requirement that a petitioner file a petition for review within 21 days after the  
14 record is received is strictly enforced, and failure to comply results in dismissal of the appeal.  
15 *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535 (1995). Failure  
16 to file the petition for review within the time specified by OAR 661-010-0030(1) is not a  
17 technical violation of LUBA’s rules. OAR 661-010-0005; *Weeks v. City of Tillamook*, 23 Or  
18 LUBA 255, 256 (1992). Failure to timely file the petition for review is not excused even  
19 where petitioner relies on erroneous information from LUBA’s staff, at least where the  
20 petitioner knew or should have known the correct information. *North Park Annex v. City of*  
21 *Independence*, 35 Or LUBA 512, 514-15 (1999) (petitioner received the Board’s order

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<sup>2</sup>OAR 661-010-0075(1)(c) provides:

“If a record has been filed and a petition for review is not filed within the time required by these rules, and the governing body files a cost bill pursuant to this section requesting forfeiture of the filing fee and deposit, the filing fee and deposit required by OAR 661-010-0015(4) shall be awarded to the governing body as cost of preparation of the record. See OAR 661-010-0030(1).”

1 settling the record as of January 11, 1999, but chose to rely on erroneous information from  
2 LUBA staff that the record was settled January 22, 1999).

3 Contrary to petitioner's understanding, the requirement that petitioner file a timely  
4 petition for review is triggered under our rules by LUBA's receipt of the record, not the  
5 conveyance of information in LUBA's form letter regarding the date LUBA received the  
6 record. That form letter is intended to inform the parties of the precise date that LUBA  
7 received the record, so that the parties can calculate under our rules the *last possible* date the  
8 petition for review and response brief can be timely filed.<sup>3</sup> LUBA's omission in the April  
9 25, 2001 letter is regrettable, but that letter nonetheless was sufficient to convey to the parties  
10 the essential information that by April 25, 2001, LUBA had received the record, and that the  
11 petition for review was due 21 days from receipt of the record. While the letter was  
12 insufficient to inform the parties of the precise date the record was received, and therefore  
13 convey the information necessary to calculate accurately the last possible date for timely  
14 submission of the petition for review, it clearly sufficed to place the parties on notice that the  
15 petition for review was due *no later* than May 16, 2001.<sup>4</sup> However, petitioner did not file  
16 the petition for review by that date, or at any time thereafter.

17 Further, to the extent the April 25, 2001 letter was misleading, it sufficed to place on  
18 petitioner some obligation to make inquiry with LUBA as to the precise date the record was  
19 received, if petitioner wished to calculate the last day for filing the petition for review.  
20 However, at no relevant time did petitioner contact LUBA to make such inquiries.

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<sup>3</sup>The record must be delivered to or received by LUBA on or before the due date. OAR 661-010-0025(2). Contemporaneously with transmittal to LUBA, the local government must serve a copy of the record on petitioner, although that service may be by mail. OAR 661-010-0025(3); 661-010-0075(2)(b)(B). Therefore LUBA may receive the record before the petitioner receives the copy of the record.

<sup>4</sup>We do not intend the foregoing to express an opinion regarding whether, following receipt of the letter in this case, a petition for review filed May 16, 2001, could have been deemed timely filed under our rules. Petitioner did not file the petition for review on that date or any other, so that issue is not before us. It is intended to illustrate that a reasonable person would not conclude from LUBA's letter, as petitioner apparently did, that the 21-day deadline for filing the petition for review had not yet commenced.

1           Finally, petitioner does not dispute that he was served a copy of the record on April  
2 24, 2001, as required by OAR 6610-010-0025(3). The record contains a certificate that  
3 states the city filed the record with LUBA on April 24, 2001, and served a copy of the record  
4 on petitioner by mail on that date. Thus, notwithstanding the omission in LUBA's letter, and  
5 even without inquiry to LUBA, petitioner knew or should have known the precise date the  
6 record was filed with LUBA.

7           In sum, while unfortunate, the omission in LUBA's letter did not cause petitioner's  
8 failure to file a timely petition for review, and does not provide a basis to avoid the mandate,  
9 at OAR 661-010-0030(1), that this appeal be dismissed. The city's motion to dismiss is  
10 granted, and petitioner's contrary motions are denied.<sup>5</sup>

11           This appeal is dismissed.

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<sup>5</sup>We will address the city's request for forfeiture of petitioner's filing fee and deposit for costs in a separate order after the appeal period has run or any appeals have been resolved.