

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

3
4 MARILYN ALLEN,
5 *Petitioner,*

6
7 vs.

8
9 GRANT COUNTY,
10 *Respondent,*

11 and

12
13
14 STEVE PARSONS and DOROTHY PARSONS,
15 *Intervenors-Respondent.*

16
17 LUBA No. 2001-096

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Grant County.

23
24 Foster A. Glass, Bend, represented petitioner.

25
26 John M. Junkin, Portland, represented respondent.

27
28 Michelle T. Timko, Fossil, represented intervenors-respondent.

29
30 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,
31 participated in the decision.

32
33 DISMISSED

11/05/2001

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.
37

MOTION TO DISMISS

Intervenors-respondent (intervenors) move to dismiss this appeal, on the ground that petitioner failed to file the petition for review within the time prescribed by our rules.

The record was filed in this case on July 10, 2001. On July 23, 2001, petitioner filed objections to the record. On August 23, 2001, the Board issued an order resolving petitioner’s record objections. The order stated in relevant part:

“The record is settled as of the date of this order. The petition for review shall be due 21 days after the date of this order. Response briefs shall be due 42 days after the date of this order.” *Allen v. Grant County*, ___ Or LUBA ___ (Order, August 23, 2001), slip op 3.

The Board’s August 23, 2001 order was served on the parties by first class mail, including petitioner’s attorney, on August 23, 2001.¹ As a consequence of that order, the petition for review was due on September 13, 2001. OAR 661-010-0026(6); 661-010-0030(1).² However, the petition for review was not filed on that date, nor has an extension of time to file the petition for review been granted.

¹The Board’s certificate of mailing lists the correct address for petitioner’s attorney. No copy of that order has been returned to the Board’s offices as undelivered.

²OAR 661-010-0026(6) provides:

“If an objection to the record is filed, the time limits for all further procedures under these rules shall be suspended. When the objection is resolved, the Board shall issue an order declaring the record settled and setting forth the schedule for subsequent events. Unless otherwise provided by the Board, the date of the Board’s order shall be deemed the date of receipt of the record for purposes of computing subsequent time limits.”

OAR 661-010-0030(1) provides, in relevant 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 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. * * *”

1 On September 25, 2001, intervenors filed a motion to dismiss this appeal, arguing
2 that the petition for review was not filed within the time set forth in our August 23, 2001
3 order and, therefore, OAR 661-010-0030(1) requires dismissal.

4 Petitioner filed the petition for review on October 4, 2001. On the next day,
5 petitioner filed a response to the motion to dismiss, arguing that the appeal should not be
6 dismissed, because petitioner never received the Board's August 23, 2001 order setting the
7 briefing schedule.³ Supporting the response are two affidavits, one from the legal assistant
8 to petitioner's attorney, and the other from petitioner's attorney. The legal assistant's
9 affidavit states in relevant part:

10 “* * * On or about September 11, 2001, I called [LUBA] at Mr. Glass’
11 direction to determine the exact due date of the Petitioner’s Brief in the
12 above-captioned matter. * * * [LUBA staff] checked the computer record and
13 told me the due date for the Respondent’s brief. I asked her about the due
14 date for the Petitioner’s brief, and she told me that she didn’t see anything on
15 the calendar regarding the due date for Petitioner’s brief.” Affidavit of Mary
16 Hebard 1-2.

17 The affidavit of petitioner’s attorney states in relevant part:

18 “Pursuant to OAR 661-010-00[26(2)(a)], an objection to the record was made
19 and mailed by Petitioner on July 23, 2001. [Intervenor] has alleged that the
20 Board gave Petitioner until September 13, 2001, in which to file the Petition
21 for Review. This office did not receive any such notice.

22 “On or about September 6, 2001, I requested staff to again check with LUBA
23 to see why we had *not* received any documents on settlement of the record
24 and new date for brief. On September 10, 2001, Petitioner faxed [petitioner’s
25 attorney] on questions of deadlines. I again asked staff to check
26 deadlines/status with LUBA. As set forth in the affidavit of Mary Hebard, she
27 checked on or about September 11, 2001 (she does not recall the exact date)
28 and was told the due date for Respondent’s brief, and questioned why no date
29 was set for Petitioner’s brief. My memory was that the date of her call was
30 probably later because when the information was transmitted to me, I called
31 LUBA as the presence of Respondent’s due date indicated to me that a
32 Petitioner’s brief date would also be set. My memory is that I talked to

³Petitioner also advances a number of arguments based on the Board’s rules, various statutes, and provisions of the Oregon Constitution. We reject those arguments without discussion.

1 LUBA clerical staff upon receiving the information from Mary Hebard (the
2 day after she called LUBA). I called LUBA staff on September 14 and found,
3 after further inquiry, the clerk read a LUBA letter, stating Petitioner’s Brief
4 was due on September 13. We have forwarded Petitioner’s Brief to LUBA,
5 which was completed thirteen days after we received actual verbal notice of
6 the letter from LUBA settling the transcript and setting the date for
7 Petitioner’s brief.” Affidavit of Foster A. Glass 1-2 (emphasis in original).

8 In the response, petitioner’s attorney argues that because he did not receive the
9 Board’s August 23, 2001 order apprising the parties of the briefing schedule, and did not
10 learn of the deadline for filing the petition for review until after it had passed, LUBA should
11 interpret and apply OAR 661-010-0005 in a manner that provides the parties with
12 “reasonable notice” and a “reasonable time to prepare and submit their cases and a full and
13 fair hearing.” OAR 661-010-0005.⁴ Petitioner cites to *Benjamin v. City of Ashland*, 19 Or
14 LUBA 600, 602 (1990), and *Hearne v. Baker County*, 15 Or LUBA 635, 636 (1987), for the
15 proposition that the occurrence of certain acts, such as service of the record on petitioner, are
16 a predicate for applying the deadline for filing the petition for review. We understand
17 petitioner to argue for an extension of that principle here, to make actual or imputed
18 knowledge of the deadline for filing the petition for review a predicate to application of that
19 deadline.

20 Intervenors respond that petitioner’s attorney has not established that his office never
21 received the Board’s August 23, 2001 order. Intervenors argue that the submitted affidavits
22 never clearly state that petitioner’s attorney’s office did *not* receive the August 23, 2001

⁴OAR 661-010-0005 provides:

“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 OAR 661-010-0030(1) is not a technical violation.”

1 order, and in fact contain statements suggesting that the office received the order and that
2 petitioner's attorney knew or should have known that the record had been settled prior to
3 September 14, 2001. In any case, intervenors argue, the evidence submitted is insufficient to
4 overcome the presumption, based on LUBA's certificate of mailing, that the August 23, 2001
5 order was mailed to and received by petitioner's attorney.

6 Intervenor's argue in the alternative that, even assuming that petitioner's attorney did
7 not receive the order and did not know of the deadline prior to September 14, 2001, and even
8 assuming that that circumstance might be a sufficient basis to extend the deadline established
9 in that order, an extension of the deadline is not appropriate in this case because petitioner
10 never consulted with LUBA or intervenors or filed timely motions requesting a reasonable
11 extension of time. Instead, intervenors argue, petitioner unilaterally chose to file the petition
12 for review an *additional* 21 days after the deadline, without first providing any justification
13 for the delay.

14 The deadline for filing the petition for review is strictly enforced, even where
15 irregularities occur in providing notice of the deadline for filing the petition for review.
16 *Bybee v. City of Salem*, ___ Or LUBA ___ (LUBA No. 2001-065, June 13, 2001) slip op 4-5.
17 In *Bybee*, LUBA's letter acknowledging receipt of the record failed to specify the date the
18 record was received and failed to specify the deadline for filing the petition for review. We
19 nevertheless dismissed the appeal when the petition for review was not timely filed, where
20 the petitioner knew or should have known of the deadline by other sources. *See also North*
21 *Park Annex v. City of Independence*, 35 Or LUBA 512, 514-15 (1999) (untimely petition
22 rejected, where the petitioner received the Board's order settling the record as of January 11,
23 1999, but chose to rely on erroneous information from LUBA staff that the record was settled
24 January 22, 1999); *Peebles v. City of Wilsonville*, 34 Or LUBA 235, 241-42 (1998) (untimely
25 petition rejected, where a letter from LUBA erroneously informed the petitioner when the
26 record was received, but LUBA corrected the letter one day later and the petitioner failed to

1 read the corrected letter until after the deadline passed).

2 We need not determine whether lack of actual or imputed knowledge of the deadline
3 for filing the petition for review might provide a basis to extend the deadline established in
4 our August 23, 2001 order, or whether and when petitioner's attorney had actual or imputed
5 knowledge of the deadline in the present case. We agree with intervenors' alternative
6 argument that, even assuming such an extension is permissible in appropriate circumstances,
7 such circumstances do not exist here.

8 The submitted affidavits suggest that petitioner's attorney first knew or should have
9 known of the deadline no earlier than September 11, 2001, and perhaps as late as September
10 14, 2001. Assuming that is true, and assuming that such circumstance might warrant relief
11 from the deadline established in our August 23, 2001 order, we believe petitioner had an
12 obligation to act promptly and request such relief to avoid prejudice to other parties'
13 substantial rights. *See Pereira v. Columbia County*, 39 Or LUBA 760, 765 (2001) (LUBA
14 will not revoke an order extending the deadline for filing the petition for review and restore
15 the original deadline where, due to the opponent's six-week delay in seeking relief, the
16 original deadline could not be restored without prejudice to other parties' substantial rights).
17 Petitioner could have immediately informed the Board and other parties of the circumstances,
18 and filed a timely motion, supported by appropriate affidavits or other evidence, seeking a
19 reasonable extension of time to file the petition for review.⁵ Petitioner could also have
20 completed and filed the petition for review as soon as possible, pending resolution of the
21 motion. Petitioner took neither of these steps.

22 Instead, petitioner seems to have assumed that the petition was not due until 21 days
23 after September 14, 2001, the date petitioner's attorney alleges he first received verbal notice

⁵It is not clear whether petitioner's attorney's telephone communications with the Board on September 14, 2001, conveyed petitioner's position that petitioner had not received the August 23, 2001 order. Petitioner apparently did not contact intervenors' attorney or inform her of the circumstances, until filing the response to the motion to dismiss on October 5, 2001.

1 that the record had been settled. Petitioner offers no justification for that assumption, or for
2 the delay in seeking relief from OAR 661-010-0030(1), or the delay in filing the petition for
3 review. Intervenors argue that their substantial rights to speedy review have been prejudiced
4 by that delay, combined with the delay in resolving petitioner's nonmeritorious record
5 objection. According to intervenors, they seek to install various improvements authorized by
6 the challenged decision before winter sets in, a schedule threatened by petitioner's conduct.
7 Intervenors argue that "time is of the essence" in land use matters, and particularly in this
8 land use matter, and that petitioner's unjustified delay in responding to the alleged lack of
9 notice militates against granting the requested extension. ORS 197.805.

10 We agree with intervenors that petitioner's delay after September 14, 2001 was
11 unjustified, and that that delay prejudiced intervenors' substantial rights. Therefore, even
12 assuming petitioner did not receive the Board's August 23, 2001 order, and that that
13 circumstance might provide a basis for requesting relief from OAR 661-010-0030(1) in a
14 timely manner, petitioner's subsequent failure to seek relief in a timely manner has
15 prejudiced other parties' substantial rights. For that reason the Board will not grant the
16 requested relief.

17 Because the petition for review was not filed within the time prescribed by our rules,
18 and petitioner's request to extend that time is denied, this appeal is dismissed. OAR 661-
19 010-0030(1).