

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 THE CONFEDERATED TRIBES OF
5 THE WARM SPRINGS RESERVATION
6 OF OREGON,
7 *Petitioner,*

8
9 and

10
11 FRIENDS OF THE METOLIUS, TONI FOSTER,
12 NANCY PRINCE, MARY A. ZEMKE,
13 PALMER GROTE, TAMMY A. DEVINE,
14 DONALD E. RATLIFF Jr., RUPERT LAVERS,
15 EDITH LAVERS, DAVE STEVENSON and
16 JEFFERSON COUNTY FARM BUREAU,
17 *Intervenors-Petitioner,*

18
19 vs.

20
21 JEFFERSON COUNTY,
22 *Respondent.*

23
24 LUBA Nos. 2002-017, 2002-018,
25 2002-019, 2002-020 and 2002-021

26 ORDER EXTENDING DEADLINE
27 FOR FILING THE PETITIONS FOR REVIEW

28 Intervenors-petitioners Zemke, Stevenson and Jefferson County Farm Bureau
29 (intervenors) request that we extend the May 1, 2002 deadline for filing the petitions for
30 review. We explained the circumstances that underlie intervenors' request in an April 23,
31 2002 order.

32 "LUBA received the record in this appeal on April 10, 2002. Through an
33 oversight, LUBA did not send its usual letter to all the parties in this appeal
34 advising them that the record had been received on that date.¹ At this point
35 we cannot tell whether any of the intervenors petitioner who did not request a
36 copy of the record that was filed with LUBA on April 10, 2002 intend to file a
37 petition for review and, if so, whether they may have been prejudiced by
38 LUBA's failure to contemporaneously advise the parties that the record had
39 been received on April 10, 2002. Accordingly, unless one or more of the
40 intervenors establishes that its substantial rights were prejudiced by that

1 failure on our part, the current deadline for filing the petition for review
2 remains in effect. The petitions for review shall be due May 1, 2002.

3 _____
4 “¹That letter is important because while the county must serve a copy of the
5 record on petitioner (and according to the certificate of service it did so here)
6 it need not serve a copy of the record on intervenors unless they request a
7 copy and reimburse the county for the expense of copying the record
8 (according to the certificate of service only intervenors-petitioner Friends of
9 the Metolius and Toni Foster were served with a copy of the record). Unless
10 LUBA advises the intervenors that the record has been received, they may not
11 know that the record has been received and that the 21 day deadline for filing
12 the petitions for review has begun.”

13 *The Confederated Tribes of the Warm Springs Reservation v. Jefferson County*, ___ Or
14 LUBA ___ (LUBA Nos. 2002-017/018/019/020/021, Order, April 23, 2002), slip op 1-2.

15 Intervenor Stevenson and Jefferson County Farm Bureau explain that “on or around
16 April 15, 2002,” intervenors attorney learned that the record had been filed, thereafter
17 requested a copy of the record and received a copy of the record from the county on April 19,
18 2002. Intervenor Zemke claims that she did not learn that the record had been received by
19 LUBA until April 24, 2002.¹ Intervenor contend that LUBA’s failure to give the parties
20 contemporaneous notice that it received the record on April 10, 2002 prejudices their
21 substantial rights, which include “a reasonable opportunity to prepare and submit argument.”
22 *Markham v. Coos County*, 31 Or LUBA 529 (1996). Intervenor point out that the
23 challenged decision makes numerous revisions to the county’s zoning code, took over two
24 years to adopt and generated a record that contains 3,694 pages. In support of their request,
25 intervenors also point out that under OAR 661-010-0026(2) the 14-day deadline for filing
26 objections to the record is measured from “the date appearing on the notice of record
27 transmittal sent to the parties by the Board.” Therefore, intervenors argue, if April 23, 2002

¹Intervenors were aware that LUBA issued an order on February 26, 2002, which extended the deadline for filing the record to April 12, 2002. We do not know why intervenors did not make a prior request that the county provide them with a copy of the record at the same time the county filed the record with LUBA on April 10, 2002. The county was not required under our rules to provide the intervenors notice that the record was filed at the same time it filed the record with LUBA, and the county did not do so here.

1 is the date LUBA gave the parties notice that the record was received; record objections are
2 not due until May 7, 2002, which is seven days *after* the petitions for review are presently
3 due.²

4 With exceptions that do not apply here, OAR 661-010-0067(2) requires the written
5 consent of all parties to extend the deadline for filing the petition for review.³ The county
6 objects to extending the deadline for filing the petition for review. The county emphasizes
7 that all parties were aware of the April 12, 2002 deadline for filing the record in this matter
8 and contends that no party can therefore claim to be surprised that the record was filed two
9 days early on April 10, 2002.

10 We did not extend the deadline for filing the petition for review in our April 23, 2002
11 order, because we could not be certain that such an extension was necessary to avoid
12 prejudice to one or more party's substantial rights. We believe that intervenors have
13 established that LUBA's error in failing to advise the parties that the record in this matter
14 was received on April 10, 2002 will result in prejudice their substantial rights unless the
15 deadline for filing the petitions for review is extended. As we recently explained, "[LUBA]
16 has an inherent obligation under its statutes and rules to take reasonable steps to notify the
17 parties of deadlines, particularly critical deadlines such as that for filing the petition for
18 review. *Witke v. City of Milwaukie*, ___ Or LUBA ___ (LUBA No. 2001-193, Amended
19 Order Settling the Record) slip op at 2. There are many reasons why the record might have
20 been filed after the April 12, 2002 deadline, and we believe it was reasonable in this case for
21 the parties to expect that LUBA would tell them when the record was received.

²A record objection suspends the deadline for filing the petition for review. OAR 661-010-0026(6).

³OAR 661-010-0067(2) provides:

"Except as provided in this section and OAR 661-010-0045(9), in no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties. * * * The Board may, on a motion of a party or its own motion, extend the deadline for filing the petition for review to allow time to rule on a motion to dismiss. * * *."

1 It is not altogether clear whether express authority under our rules is required for
2 LUBA to extend the deadline for filing the petition for review without the written consent of
3 all parties in circumstances other than those set out in OAR 661-010-0067(2). To the extent
4 such express authority is required, we construe OAR 661-010-0065(4) to allow LUBA to
5 extend that deadline, on its own motion, where an extension of that deadline is required to
6 avoid prejudice to one or more party's substantial rights due to the Board's failure to provide
7 the parties notice that LUBA has received the record.⁴ On our own motion we suspend the
8 current deadline for filing the petitions for review and establish April 23, 2002 as the date the
9 21-day deadline for filing the petition for review began to run in this appeal.⁵ Any objections
10 to the record that was filed by the county in this matter shall be filed no later than May 7,
11 2002.

12 If no record objections are filed, petitions for review in this appeal shall be due May
13 14, 2002. Respondent's brief shall be due June 4, 2002.⁶ The Board's final opinion and
14 order shall be due July 9, 2002.

15 Dated this 29th day of April, 2002.
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⁴OAR 661-010-0065(4) provides:

“Effect of Filing Motion: Except as provided in OAR 661-010-0026(6) with regard to objections to the record and OAR 661-010-0045(9) with regard to motions to take evidence, *or as may otherwise be ordered by the Board on its own motion*, the filing of a motion shall not suspend the time limits for other events in the review proceeding.” (Emphasis added.)

On our own motion we suspend the current deadline for filing the petitions for review and establish April 23, 2002 as the date the record is considered settled in this matter.

⁵We see no reason why there should be a different deadline for filing the petition for review for petitioner and intervenors-petitioner Friends of the Metolius and Toni Foster who apparently were sent copies of the record as the same time the record was sent to LUBA. The May 14, 2002 deadline applies to petitioner and all intervenors-petitioner.

⁶We understand that respondent's attorney has a planned vacation that may conflict with the changed briefing schedule that is established in this order. If so, respondent may request an extension of time to prepare and file the respondent's brief. Written consent of all parties is not required to extend the deadline for filing respondent's brief.

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Michael A. Holstun
Board Chair