

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 WEST COAST MEDIA, LLC,  
4 *Petitioner,*

5 vs.

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7  
8 CITY OF TIGARD,  
9 *Respondent.*

10 LUBA No. 2003-079

11 ORDER ON MOTION TO DISMISS

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13  
14 The city moves to dismiss this appeal, arguing that the amended notice of intent to  
15 appeal filed pursuant to OAR 661-010-0021(5) was untimely.

16 The city withdrew its original decision pursuant to OAR 661-010-0021. LUBA  
17 received the city's decision on reconsideration on August 6, 2003. Petitioner mailed the  
18 amended notice of intent to appeal to LUBA via certified mail on August 26, 2003, and  
19 LUBA received the amended notice on August 28, 2003. OAR 661-010-0021(5) requires  
20 that a petitioner "file an amended notice of intent to appeal" with LUBA "within 21 days  
21 after the decision on reconsideration is received by [LUBA]."<sup>1</sup>

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<sup>1</sup> OAR 661-010-0021(5) provides, in relevant part:

"After the filing of a decision on reconsideration:

"(a) If the petitioner wishes review by the Board of the decision on reconsideration:

"(A) Except as provided in paragraph (B) of this subsection, the petitioner shall file an amended notice of intent to appeal together with two copies within 21 days after the decision on reconsideration is received by the Board.

"(B) In the event the local government or state agency affirms its decision or modifies its decision with only minor revisions, the petitioner may refile the original notice of intent to appeal, with the date of the decision on reconsideration indicated thereon, together with two copies within 21 days after the decision on reconsideration is received by the Board.

"(b) Refiling of the original notice of intent to appeal or filing of an amended notice of intent to appeal is accomplished by delivery of the Notice to the Board, or receipt of the Notice by the Board, on or before the due date.

1 The city argues that the amended notice was not “filed” for purposes of OAR 661-  
2 010-0021(5) until August 28, 2003, when the Board received the amended notice. The  
3 amended notice was untimely filed 22 days after LUBA received the decision on  
4 reconsideration, the city argues, and therefore this appeal must be dismissed. The city  
5 contends that failure to file the amended notice within the time allowed by OAR 661-010-  
6 0021(5) is a jurisdictional defect.

7 As the city points out, OAR 661-010-0021(5)(b) provides that refiling of the original  
8 notice or filing of the amended notice is accomplished by one of two methods: (1) either  
9 “delivery” of the notice to LUBA or (2) “receipt” of the notice by LUBA. Unlike OAR 661-  
10 010-0015(1)(b), OAR 661-010-0021(5)(b) does not expressly provide that the date of filing  
11 the original or amended notice is the date the notice is mailed by registered or certified mail.<sup>2</sup>  
12 Further, original or amended notices filed under OAR 661-010-0021(5) are not among the  
13 documents that may be deemed “filed” on the date of mailing by first-class mail, pursuant to  
14 OAR 661-010-0075(2)(a).<sup>3</sup> The city thus appears to be correct that an original or amended

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“\* \* \* \* \*

“(e) If no amended notice of intent to appeal is filed or no original notice of intent to appeal is refiled, as provided in subsection (5)(a) and (b) of this rule, the appeal will be dismissed.”

<sup>2</sup> OAR 661-010-0015(1) provides, in relevant part:

“(a) The Notice, together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by ORS 197.830(3) through (5). \* \* \* A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.

“(b) 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. \* \* \*.”

<sup>3</sup> OAR 661-010-0075(2)(a) provides:

1 notice mailed on or before the deadline specified by OAR 661-010-0021(5)(a)(A) or (B) but  
2 actually received by the Board after that date is untimely filed.

3 As OAR 661-010-0015(1)(b) is currently written, a notice of intent to appeal that is  
4 sent to LUBA by registered or certified mail is deemed “filed” on the date the notice is  
5 “mailed.” Under OAR 661-010-0021(5)(b), an amended or refiled notice of intent to appeal  
6 that is sent to LUBA by registered or certified mail is “filed” on the date the notice is  
7 “delivered” to or “received” by LUBA. That difference is likely an oversight, and LUBA  
8 may choose to correct that oversight when its administrative rules are next revised.  
9 However, we are not at liberty to read language into OAR 661-010-0021(5)(b), to make  
10 filing of an amended notice or refiled notice by registered or certified mail effective  
11 upon mailing.

12 That said, the city cites no authority for its view that untimely filing of an original or  
13 amended notice under OAR 661-010-0021(5) is a jurisdictional defect that in itself requires  
14 dismissal of this appeal. There is no doubt that untimely filing of a notice of intent to appeal  
15 under OAR 661-010-0015(1) is treated as a jurisdictional defect that requires dismissal,  
16 because our rules and cases so provide. *See* OAR 661-010-0015(1)(b); *Port of Portland v.*  
17 *Portland*, 3 Or LUBA 109, 110 (1981). In contrast, OAR 661-010-0021(5) does not provide  
18 that untimely filing of an original or amended notice under OAR 661-010-0021(5) requires  
19 dismissal, and we can find no cases that suggest otherwise.

20 Even more to the point, OAR 661-010-0005 provides that:

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“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. \* \* \*”

1 “These rules are intended to promote the speediest practicable review of land  
2 use decisions and limited land use decisions, in accordance with ORS  
3 197.805-197.855, while affording all interested persons reasonable notice and  
4 opportunity to intervene, reasonable time to prepare and submit their cases,  
5 and a full and fair hearing. The rules shall be interpreted to carry out these  
6 objectives and to promote justice. *Technical violations not affecting the*  
7 *substantial rights of parties shall not interfere with the review of a land use*  
8 *decision or limited land use decision. Failure to comply with the time limit for*  
9 *filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition*  
10 *for review under OAR 661-010-0030(1) is not a technical violation.”*  
11 (Emphasis added).

12 OAR 661-010-0005 sets out a general rule that violations of LUBA’s rules are  
13 considered “technical violations” that shall not interfere with our review unless they affect  
14 the substantial rights of the parties. The rule then sets out two express exceptions to that  
15 general rule: the deadlines for filing the notice of intent to appeal under OAR 661-010-  
16 0015(1) and the deadline for filing the petition for review under OAR 661-010-0030(1).  
17 Because the deadlines for refileing the original notice or filing the amended notice under  
18 OAR 661-010-0021(5) are not subject to that exception, those deadlines are subject to the  
19 general rule.<sup>4</sup> The city makes no attempt to argue that mailing the amended notice one day  
20 prior to the deadline specified in OAR 661-010-0021(5), with receipt of that notice by LUBA  
21 one day after the deadline, affects any party’s substantial rights in this review, and we do not  
22 see that it does.

23 The city’s motion to dismiss is denied.

24 Dated this 11th day of September, 2003.

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26 \_\_\_\_\_  
27 Tod A. Bassham  
28 Board Chair

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<sup>4</sup> This may also have been an oversight. If LUBA amends OAR 661-010-0021(5) in the future to deem notices and amended notices that are refiled or filed by registered or certified mail as filed on the date of mailing, it may be appropriate to amend OAR 661-010-0005 to make dismissal the required consequence where a notice or amended notice is not timely filed under OAR 661-010-0021(5).