

1 Board without jurisdiction to hear the case.¹ Jeffries
2 allege that they were not so served within the time allowed by
3 Board Rule 4(C).² For support, the Jeffries cite City of
4 Pendleton v LUBA, 51 Or App 539, 626 P2d 388 (1981).

5 "The legislature has determined the limits of LUBA's
6 subject matter jurisdiction. The statutory
7 requirement of service on an applicant of record is
8 jurisdictional. LUBA, on the other hand, is merely
9 authorized by the legislature to promulgate rules
10 governing the conduct of its proceedings, not to find
11 its own jurisdiction." 51 Or App at 545.

12 The Jeffries also argue that a decision in this appeal
13 proceeding could seriously affect their interests, and failure
14 to serve on them with notice of this appeal proceeding denies
15 the Jeffries due process. Without timely service of the notice
16 and an opportunity to participate under Board Rule 5, the
17 Jeffries are precluded from involvement in the case because the
18 time for filing a notice of intent to participate is past under
19 Board Rule 5.³ The Jeffries say they are left only with the
20 opportunity to intervene under Board Rule 11.⁴ However,
21 according to their argument, intervention requires a showing of
22 adverse affect or aggrievement, and the Jeffries are not
23 adversely affected or aggrieved by the decision because they
24 support the decision. The Jeffries argue they are not
25 therefore entitled to intervene.

26 Petitioners claim that the Jeffries are not applicants.
Participants argue that Corner Terrace, a business owned by
Participants Steve Barry and James Barry, initiated the change

1 in the urban growth boundary. As such, Corner Terrace is the
2 only applicant in this proceeding. Petitioners characterize a
3 document entitled "Consent To Include Property Within
4 Metropolitan Service District Urban Growth Boundary" appearing
5 in the record to be evidence of consent to inclusion in the
6 urban growth boundary, not a request "application" to be
7 included. Petitioners further claim that Metro did not notify
8 the Jeffries of this decision or recognize the Jeffries as
9 applicants. Metro's records, according to petitioners,
10 identify Corner Terrace as the only applicant.

11 Whether or not the Jeffries fall strictly within the
12 definition of "applicant" in our rule is not critical to the
13 outcome of this motion to dismiss. We recognize that 1979 Or
14 Laws, ch 772, sec 4(4), as amended by Oregon Laws 1981, ch 748,
15 requires that service be made on the applicant. We also
16 recognize that the law provides that the Board may adopt rules
17 controlling service. The Board has done so, and the rule
18 requires service on the applicant within 30 days of the date of
19 the land use decision.⁵ However, the Board has also provided
20 that its rules need not be strictly enforced if to do so would
21 not promote the ends of justice⁶. In Atwood v Portland, 1 Or
22 LUBA 355 (1980), the Board held that because of 1979 Or Laws,
23 ch 772, sec 4(4), notice of intent to appeal had to be filed
24 with the Board within 30 days of the local decision. The 30
25 day filing is therefore a "jurisdictional" requirement under
26 the law. However, the law did not provide a parallel 30 day

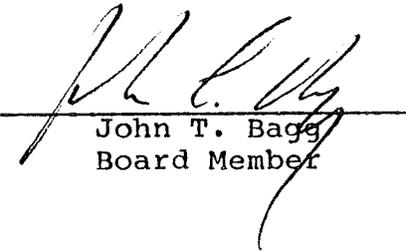
1 limit on service of the notice of intent to appeal on the
2 applicant and the governing body. Therefore, consistent with
3 Board Rule 4, we held we would not dismiss the appeal unless
4 the error of service resulted in serious harm or prejudice.

5 "The 30-day limit specified in the first sentence for
6 filing of the Notice of Intent to Appeal does not
7 appear in the second sentence. Had the Legislature
8 intended service of the notice within 30 days to be
9 jurisdictional, language such as that appearing in ORS
10 19.0330 or ORS 46.253 would have been chosen in place
11 of what appears in the LUBA statute. Absent a clear
12 legislative intent to require service on Applicant and
13 City within 30 days, the Board will not dismiss the
14 appeal unless the error or omission has resulted in
15 serious harm or prejudice." (Citation omitted).
16 Atwood v Portland, 1 Or LUBA 356.

17 We note that the Jeffries have not alleged prejudice to
18 them other than a denial of due process of law through failure
19 of service. We believe that as the Jeffries may now enter this
20 proceeding as participants, the Jeffries will be afforded due
21 process. Without an explanation of prejudice to the Jeffries,
22 we decline to dismiss the case.⁷

23 The motion to dismiss is denied.

24 Dated this 1st day of April, 1983

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John T. Bagg
Board Member

FOOTNOTES

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3 ¹
4 1979 Or Laws, ch 772, sec 4(4) provides:

5 "A notice of intent to appeal a land use decision
6 shall be filed not later than 30 days after the date
7 the decision sought to be reviewed becomes final.
8 Copies of the notice shall be served upon the city,
9 county or special district governing body or state
10 agency and the applicant of record, if any, in the
11 city, county or special district governing body or
12 state agency proceeding. The notice shall be served
and filed in the form and manner prescribed by rule of
the board and shall be accompanied by a filing fee of
\$50 and a deposit for costs of \$150. In the event a
petition for review is not filed with the board as
required in subsection (6) of this section, then the
filing fee and deposit shall be awarded to the city,
county, special district or state agency as cost of
preparation of the record."

13 LUBA Rule 3(A) defines an "applicant of record" as

14 "the person identified by the governing body as having
15 applied for authorization for a particular land use
16 activity or having requested that the governing body
take some action which resulted in a land use
decision."

17
18 ²
19 LUBA Rule 4(C) provides:

20 "Filing and service of the notice must be filed with
21 the Board and served on the governing body, the
22 governing body's legal counsel, and all persons
identified in the notice as required by Section
4(A)(6) of these rules within 30 days from the date of
the land use decision."

23 ³
24 LUBA Rule 5(A) states:

25 "Any person identified in the Notice other than the
26 petitioner and governing body, who desires to
participate as a party in the appeal shall within 15

1 days of service of the Notice upon such person, file
2 with the Board and serve on all parties designated in
3 the Notice, a Statement of Intent to Participate. Any
4 person identified in the Notice who fails to file a
5 Statement of Intent to Participate may not later
6 intervene in the proceeding as provided in sec 11 of
7 these rules. The Statement may be in the form set
8 forth in Exhibit B to these rules."

6 4

LUBA Rule 11, in pertinent part, states:

7 "Except for those persons identified in the Notice of
8 Intent to Appeal as required by sec 4(A)(6) of these
9 rules, any person whose interests were adversely
10 affected or who was aggrieved by a land use decision
11 or, in the case of review of a quasi-judicial land use
12 decision, who appeared before the governing body
13 orally or in writing and who was either entitled as of
14 right to notice and hearing prior to the making of the
15 land use decision by the governig body or who was a
16 person whose interests were adversely affected or who
17 was aggrieved by the land use decision, may intervene
18 in and become a party to any review proceeding before
19 the Board involving that land use decision. Such
20 intervention must be by written motion and must
21 contain the facts which show that the person is
22 entitled to intervene. The motion to intervene shall
23 be filed within the time for:

16 "(a) filing the petition for review, if intervention
17 is sought as a petitioner, or the time for

18 "(b) filing the respondent's brief, if intervention is
19 sought as a respondent."

20 5

Petitioners represent the Jeffries were served by service
21 on their attorney on March 14, 1983.

22 6

23 "PURPOSE

24 "The procedures established in these rules are
25 intended to provide for the speediest practicable
26 hearing and decision in the review of land use
27 decisions while affording all interested persons
28 reasonable notice and opportunity to participate,

1 reasonable time to prepare and submit their cases, and
2 a full and fair hearing. The procedures established
3 in these rules seek to accomplish these objectives to
4 the Board in Oregon Laws 1979, ch 772. These rules
5 shall be interpreted to effectuate these policies and
6 to promote justice. Technical violations of these
7 rules which do not affect substantial rights or
8 interests of parties or of the public shall not
9 interfere with the review of a petition."

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7 The Jeffries are free to move to participate in this matter
8 under Board Rule 5. Their notice of intent to participate may
9 be filed 15 days from the date they were served with the notice
10 of intent to appeal. The Jeffries are also free to intervene.
11 See Oregon Laws 1979, ch 772, Sec 4(2), as amended by Oregon
12 Laws 1981, ch 748, Board Rule 11, Orr v. City of Eugene, 6 Or
13 LUBA 438 (1982) and Seneca Sawmill v. Lane Co., 6 Or LUBA 451
14 (1982).

11 We note the petitioners say they will not object to the
12 Jeffries participation in this case.