

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF THE METOLIUS

5 and WILLIAM JOHNSON,

6 *Petitioners,*

7  
8 and

9  
10 TOMAS FINNEGAN RYAN,

11 *Intervenor-Petitioner,*

12  
13 vs.

14  
15 JEFFERSON COUNTY,

16 *Respondent,*

17  
18 and

19  
20 GORDON C. JONES and JEFFREY JONES,

21 *Intervenors-Respondent.*

22  
23 LUBA No. 2005-139

24 ORDER

25 **MOTIONS TO INTERVENE**

26 Tomas Finnegan Ryan moves to intervene on the side of petitioners. Gordon C. Jones and  
27 Jeffrey Jones move to intervene on the side of respondent. There is no opposition to either motion,  
28 and they are allowed.

29 **MOTION TO DISMISS**

30 On September 21, 2005, petitioners filed a Notice of Intent to Appeal (NITA) with the  
31 Board. The certificate of service that accompanied the NITA states that petitioners served a copy  
32 of the NITA on the county and its legal counsel on the same date by first class mail.<sup>1</sup> On

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<sup>1</sup> The certificate of service states:

1 September 22, 2005, the Board sent a letter to county counsel indicating that an appeal had been  
2 filed in this matter and requesting that the record be filed within 21 days of the date the NITA is  
3 served on the county. County counsel received the Board's letter on or about September 26,  
4 2005. On September 30, 2005, petitioners and the county counsel exchanged e-mails concerning  
5 the record. On or about the same date, county counsel became aware that the county had never in  
6 fact received the NITA. County counsel asked the planning department and other administrative  
7 staff to "double-check" to determine whether the county had ever received the NITA. Staff  
8 responded in the negative. County counsel then called intervenors' counsel, and was informed that  
9 intervenors' counsel had received the NITA, but that the copy of the NITA served on him did not  
10 list the county "on the service list attached" to the NITA. Affidavit of Jacqueline G. Haggarty, 2.

11 On October 11, 2005, the county moved to dismiss this appeal, arguing that timely service  
12 of the NITA on the respondent is jurisdictional. The motion is accompanied by an affidavit from  
13 county counsel setting out some of the foregoing facts.

14 The county's argument that timely service of the NITA is jurisdictional is based on  
15 ORS 197.830(9), which provides that "[c]opies of the notice of intent to appeal shall be served  
16 upon the local government \* \* \* in the form and manner prescribed by rule of the board."<sup>2</sup>  
17 OAR 661-010-0015(2) implements that statute, in requiring that the NITA "shall be served on the

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"I hereby certify that on September 21, 2005, I served a true and correct copy of this Notice of  
Intent to Appeal on all person[s] listed in paragraphs III and IV of this Notice pursuant to  
OAR 661-010-0015(2) by first class mail from Eugene, Oregon." NITA 2.

Paragraph III of the NITA lists the respondent as "Jefferson County Community Development, 66 SE 'D' Street  
Ste A, Madras, Oregon, 97441" and lists the county's legal counsel by name and with the same address.  
Paragraph IV refers to an attached Exhibit A with several dozen names.

<sup>2</sup> ORS 197.830(9) provides, in relevant part:

"A notice of intent to appeal a land use decision or limited land use decision shall be filed not  
later than 21 days after the date the decision sought to be reviewed becomes final. \* \* \*  
Copies of the notice of intent to appeal shall be served upon the local government, special  
district or state agency and the applicant of record, if any, in the local government, special  
district or 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 \$175 and a  
deposit for costs to be established by the board. \* \* \*"

1 governing body [and] the governing body’s legal counsel \* \* \* on or before the date the notice of  
2 intent to appeal is required to be filed.”<sup>3</sup> The county acknowledges that pursuant to OAR 661-  
3 010-0005 failure to comply with the rules governing service of the NITA is a “technical violation” of  
4 the Board’s rules that does not warrant dismissal of the appeal unless the violation prejudices other  
5 parties’ substantial rights. <sup>4</sup> However, the county argues that OAR 661-010-0005 is inconsistent  
6 with ORS 197.830(9), to the extent the rule is interpreted to classify failure to comply with the rules  
7 governing service of the NITA as a mere “technical violation.” The county cites to two recent  
8 Oregon Supreme Court cases for the proposition that serving the proper parties with the notice of  
9 appeal is a jurisdictional requirement. *McCall v. Kulongoski*, 339 Or 186, \_\_\_P3d \_\_\_ (2005);  
10 *Sizemore v. Myers*, 327 Or 71, 957 P3d 577 (1998). Because proper service of the notice of  
11 appeal is jurisdictional in other legal contexts, the county argues, it is also jurisdictional under  
12 ORS 197.830(9) and LUBA’s rules. According to the county, the burden of demonstrating that the  
13 Board has jurisdiction lies with the petitioners, and therefore LUBA’s rules cannot shift the burden  
14 to the county to demonstrate that petitioners’ violation of the rules has prejudiced the county’s  
15 substantial rights.

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<sup>3</sup> OAR 661-010-0015(2) provides, in full:

“Service of Notice: The Notice shall be served on the governing body, the governing body’s legal counsel, and all persons identified in the Notice as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed. Service of the Notice as required by this section may be in person or by first class mail. The date of serving such notice shall be the date of mailing.”

<sup>4</sup> OAR 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           Petitioners respond that the county’s motion is based on a misunderstanding of the relevant  
2 facts and the applicable law. According to petitioners, intervenors misinformed the county that the  
3 NITA does not list the county among the parties served. Section III of the NITA clearly lists the  
4 county and county counsel as parties served, in compliance with OAR 661-010-0015(3)(f)(B).  
5 Further, petitioners argue, the certificate of service accurately states that petitioners mailed copies of  
6 the NITA to all parties, including the county, by first class mail. Under OAR 661-010-  
7 0075(2)(b)(B), mail service is complete on deposit in the mail. Petitioners argue that their counsel  
8 mailed a copy of the NITA to the county and county counsel, as certified, and thus complied with  
9 LUBA’s rules. That the county may not have received that mailed copy does not mean that  
10 petitioners failed to serve the county.

11           The county responds that there is no objective proof, other than the certificate of service,  
12 that petitioners actually mailed a copy of the NITA to the county. According to the county, mere  
13 certification without further proof is insufficient to establish that the NITA was actually “served” by  
14 first class mail under LUBA’s rules.

15           From the earliest LUBA cases, the Board has consistently held that while *service* of the  
16 NITA is jurisdictional under ORS 197.830(9) and its predecessors, the *timing* of that service is  
17 not. *See, e.g., Atwood v. City of Portland*, 1 Or LUBA 355, 356-57 (1980). Nothing in the  
18 current version of ORS 197.830(9) is to the contrary. The statute requires that the NITA be  
19 served upon the local government and other parties “in the form and manner prescribed by rule of  
20 the board.” In contrast to the deadline imposed for filing the NITA, the statute imposes no deadline  
21 for serving the NITA. LUBA’s rules require service of the NITA on or before filing the NITA, but  
22 do not include timely service of the NITA among the rules the violation of which are treated as  
23 jurisdictional defects. OAR 661-010-0005. We disagree with the county that OAR 661-010-  
24 0005 is inconsistent with ORS 197.830(9).

25           As to the two cited Oregon Supreme Court cases, both cases were interpreting very  
26 different statutes and rules than the ones that govern here, and we do not understand those cases to

1 state a general law that timely service of a notice of appeal is jurisdictional in all contexts. As the  
2 Supreme Court observed in a more pertinent context, land use decisions and the criteria governing  
3 review of those decisions are *sui generis*. *People for Ethical Treatment v. Inst. Animal Care*,  
4 312 Or 95, 105, 817 P2d 1299 (1991). Caution is appropriate in extrapolating to or from other  
5 statutory contexts and the statutes and rules governing LUBA's review. As noted above, the  
6 statutes governing LUBA's rules delegate to LUBA the task of prescribing how the NITA is served  
7 on other parties. LUBA has done so, in rules that make it clear that timely service of the NITA is  
8 not jurisdictional.

9 In any case, it is not at all clear that petitioners are in violation of any of our rules.  
10 Petitioners contend that they timely placed the service copy in the mail, and certified that timely  
11 service as required by our rules. The county argues that because it did not receive that service copy  
12 some additional "proof" of service is necessary, speculating that petitioners' attorney or his staff may  
13 have inadvertently failed to do what the certificate of service avers was done. We disagree that any  
14 additional proof is necessary or appropriate. While it is possible that petitioners' attorney or his  
15 staff inadvertently failed to mail the service copy, it is also possible that the post office failed to  
16 deliver or misdelivered the copy. It is also possible that the county received the copy but somehow  
17 mislaid it. It is difficult or impossible to determine which of these possibilities, or others, actually  
18 occurred, which in our view underscores the wisdom of OAR 661-010-0005 in not treating timely  
19 service of the NITA as jurisdictional.

20 The county acknowledges that petitioners subsequently mailed another copy of the NITA to  
21 the county, which the county received, once petitioners learned that the county did not possess a  
22 copy of the NITA. Even under the county's view of the facts, the county has now been served with  
23 a copy of the NITA. The county makes no attempt to demonstrate that any delay in receiving the  
24 service copy of the NITA prejudiced the county's substantial rights. Accordingly, there is no basis  
25 to dismiss this appeal.

1 **RECORD**

2           The county indicates that it intends to file the record by November 11, 2005. It is so  
3 ordered.

4           Dated this 27<sup>th</sup> day of October, 2005.

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Tod A. Bassham  
Board Member