

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MARK HERRING, LESLIE HILDRETH,
5 JESSE ULLOA and JOANNE ULLOA,
6 *Petitioners,*

7
8 vs.

9
10 LANE COUNTY,
11 *Respondent.*

12 LUBA No. 2006-203

13
14 ORDER

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16 **MOTIONS TO INTERVENE**

17 **A. Applicant's Motion to Intervene**

18 The Notice of Intent to Appeal (NITA) was filed on November 8, 2006. On
19 December 5, 2006, Jeff Ogle (Ogle), the applicant below, moved to intervene on the side of
20 the county. Petitioners object to Ogle's motion to intervene on the basis that it was filed
21 more than 21 days after the NITA was filed.¹ Ogle does not respond to petitioners'

¹ ORS 197.830(7) provides:

“(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

“(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

“(A) The applicant who initiated the action before the local government, special district or state agency; or

“(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

“(c) Failure to comply with the deadline set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene.”

1 objections or provide any excuse for filing his motion to intervene 26 days after the NITA
2 was filed. In general, a motion to intervene must be filed within 21 days after the NITA is
3 filed. *Grahn v. City of Newberg*, 49 Or LUBA 762, 766 (2005).

4 Therefore, Ogle’s motion to intervene is denied.

5 **B. Forester’s Motion to Intervene**

6 After petitioners objected to Ogle’s motion to intervene, Marc E. Setchko (Setchko),
7 the applicant’s forester, filed a motion to intervene on the side of the county on December
8 21, 2006. That motion to intervene was filed 42 days after the NITA had been filed and well
9 after the 21-day deadline for intervention imposed by ORS 197.830(7). We have excused the
10 21-day deadline when the petitioner failed to timely serve the NITA on an applicant. *See*
11 *Ford v. Jackson County*, 50 Or LUBA 359, 365 (2005) (when NITA was not served on
12 applicant, the applicant was allowed to intervene more than 21-days after the NITA was
13 filed); *Mountain West Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000)
14 (when the petitioner did not serve the NITA on intervenor until 53 days after the NITA was
15 filed, failure to file a motion to intervene within the 21-day period prescribed by ORS
16 197.830(7) did not require that intervention be denied). Although Setchko does not
17 explicitly explain why the 21-day deadline should not be enforced, his position appears to be
18 that he filed his motion to intervene within 21 days of receiving notice of the decision.

OAR 661-010-0050 provides in pertinent part:

- “(1) Standing to Intervene: The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board. Status as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time.
- “(2) Motion to Intervene: A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-010-0015 * * *.”

1 According to Setchko, he testified on Ogle’s behalf at the hearing below but did not
2 receive notice of the decision when the county mailed notice of the decision.² Setchko only
3 received notice of the decision on December 6, 2006, when his attorney specifically
4 requested it. Presumably, Setchko believes his motion to intervene was timely because it
5 was filed within 21 days after he received notice of the decision. As explained above, the
6 21-day deadline is strictly enforced. The only exception is when someone entitled to service
7 of the NITA was not timely served and then filed a motion to intervene within 21 days of
8 actually being served with the NITA. In order to come within that narrow exception,
9 Setchko would have to establish (1) that he was entitled to be served with the NITA and (2)
10 that petitioners failed to serve him.

11 OAR 661-010-0015(3)(f)(D) provides that the NITA must be served on “[a]ny other
12 person to whom written notice of the land use decision * * * was mailed as shown on the
13 governing body’s records.”³ The challenged decision is a comprehensive plan amendment
14 and zone change. ORS 197.615 provides that the decision in post-acknowledgement plan
15 amendments must be served on persons who participated in the proceedings below *and*
16 “[r]equested of the local government in writing that they be given such notice.”⁴ While
17 Setchko may have participated in the proceedings below, he does not allege that he requested
18 in writing that he be given notice of the decision. Setchko therefore was not entitled to
19 notice of the decision and petitioners were not required to serve him with a copy of the

² Setchko was not on the county’s list of persons entitled to notice of the decision.

³ Service is not required on Setchko by any other provision of our rules.

⁴ ORS 197.615(2)(a) provides:

“* * * the local government also shall mail or otherwise submit notice to persons who:

“(A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation or the new land use regulation; and

“(B) Requested of the local government in writing that they be given such notice.”

1 NITA. Because Setchko was not entitled to be served with the NITA, he does not fall within
2 the narrow exception to ORS 197.830(7) for persons entitled to service of the NITA who are
3 not timely served.

4 Therefore, Setchko's motion to intervene is denied.

5 Dated this 12th day of January, 2007.

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Melissa M. Ryan
Board Member