

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

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4                                   DANA JACOBSEN and MOLLY JACOBSEN,  
5   *Petitioners,*

6  
7   vs.

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9                                   CITY OF WINSTON,  
10   *Respondent.*

11  
12                                   LUBA No. 2008-013

13                                   ORDER

14                   On April 15, 2008, we suspended this appeal at the request of the parties until any of  
15 the parties moved to reactivate the appeal. On May 5, 2010, we requested that the parties  
16 advise us of the status of the appeal. The city did not respond to our request. Petitioners  
17 requested that we reactivate the appeal.<sup>1</sup> When we suspended the appeal there were a  
18 pending motion to dismiss and record objections. We now reactivate the appeal and resolve  
19 the motion to dismiss.

20                   **MOTION TO DISMISS**

21                   This appeal involves a legislative post-acknowledgement plan amendment (PAPA)  
22 that made various changes to the City of Winston comprehensive plan, zoning ordinance, and  
23 subdivision ordinance. Petitioners participated at the public hearings in opposition to the  
24 amendment, the city council adopted the amendments, and this appeal followed. The city  
25 now argues that petitioners did not timely file their notice of intent to appeal (NITA) with  
26 LUBA.

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<sup>1</sup> Petitioners' letter asking to reactivate the appeal does not appear to have been served on the city. Petitioners apparently served the letter on the attorney for Douglas County and another party that has not intervened in the present appeal.

1           Because the challenged decision was a PAPA, it was processed pursuant to ORS  
2 197.610 to 197.625 (Post-Acknowledgement Procedures). ORS 197.830 provides the  
3 deadline for appealing PAPAs:

4           “A notice of intent to appeal plan and land use regulation amendments  
5 processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21  
6 days after notice of the decision sought to be reviewed is mailed or otherwise  
7 submitted to parties entitled to notice under ORS 197.615.”<sup>2</sup>

8           The challenged decision was signed on December 17, 2007. Notice of the decision  
9 was mailed to parties the city believed had requested notice on December 20, 2007.  
10 According to the city, the deadline for appealing the challenged decision was January 10,  
11 2008. The city did not initially provide petitioners with notice of the decision. The city  
12 eventually mailed petitioners notice of the decision, at petitioners’ request, on January 10,  
13 2008. Petitioners then filed their NITA on January 17, 2008.

14           ORS 197.615(2)(a)(B) requires that a local government provide notice of a PAPA  
15 decision to persons who “[r]equested \* \* \* in writing that they be given such notice.” *See n*  
16 2. The city states that petitioners were not served with notice of the challenged decision  
17 because petitioners did not request in writing that they receive notice of the decision, and  
18 therefore this appeal should be dismissed because the NITA was filed more than 21 days  
19 after persons entitled to notice were mailed notice. Petitioners devote much of their response  
20 to the argument that they were entitled to notice of the decision under local, rather than state  
21 law. Petitioners apparently assume that if they were entitled to notice of the decision under

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<sup>2</sup> 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 local law then the 21-day deadline of ORS 197.830(9) is tolled.<sup>3</sup> Petitioners also briefly  
2 mention that they did request in writing that they be provided with notice of the challenged  
3 decision.

4 Petitioners attach as an exhibit to their response to the motion to dismiss a letter dated  
5 October 23, 2007, addressed to the city council, a planning official, and the planning staff,  
6 stating in part “Please provide a copy of the decision as soon as it is approved \* \* \*.” While  
7 the letter is not in the record, petitioners assert that it was sent but the city failed to include it  
8 in the record. The city has not replied to petitioners’ response to the motion to dismiss. We  
9 generally will consider evidence outside of the record for the limited purposes of determining  
10 jurisdiction. Where no party objects to the proffered evidence, it is not necessary to move to  
11 take evidence outside of the record for such purposes. Therefore, we consider petitioners’  
12 October 23, 2007 letter.

13 ORS 197.830(9) and ORS 197.615(2) are clear that when persons request in writing  
14 that they be provided notice of a PAPA that the 21-day deadline for appealing to LUBA  
15 begins to run when that notice is mailed to the persons requesting such notice. Petitioners  
16 requested in writing that they be provided notice of the challenged decision, and therefore the  
17 city was required to provide them with notice. The city provided petitioners with notice on  
18 January 10, 2008, and seven days later, on January 17, 2008, petitioners appealed the  
19 challenged decision to LUBA. Therefore, petitioners timely appealed the challenged  
20 decision.

21 The city’s motion to dismiss is denied.

22 **RECORD OBJECTIONS**

23 When the appeal was suspended there were pending record objections. The city shall  
24 have 28 days from the date of this order to respond to petitioners’ record objections.

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<sup>3</sup> Due to our disposition of the motion, we need not decide that issue.

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Dated this 10<sup>th</sup> day of September, 2010.

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Melissa M. Ryan  
Board Member