

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a single
4 family residence in the county's commercial forestry (CFU)
5 zone.

6 **MOTION TO INTERVENE**

7 John and Rachel Burger, the applicants below,
8 (intervenors) move to intervene on the side of respondent.
9 The motion is allowed.

10 **MOTION TO DISMISS**

11 The county approved intervenors' application for
12 approval of a single family residence in the county's CFU
13 zone on December 1, 1995. On December 22, 1995 petitioner
14 filed a document with LUBA, which she referred to as:

15 "Notice of Intent to Appeal the Biased Opinions of
16 the Multnomah County Commissioners Allowing the
17 Burgers to Build on a Substandard Lot, otherwise
18 known as:

19 CU 5-95, HV-95."

20 The document does not purport to follow LUBA's rules
21 for filing appeals of local decisions, as set forth in OAR
22 660-10-015. Petitioner acknowledges in the document that
23 she had the rules in her possession, but had not read them
24 prior to preparing her appeal.¹ Instead, the document

¹Petitioner's December 22, 1995 document states, in relevant part:

"In the hopes that LUBA will be interested in maintaining the appearance of fairness, I wish to explain why I am not

1 explains weather related hardships petitioner suffered in
2 the weeks prior to the appeal deadline, recites several
3 objections petitioner has to the county's approval of
4 intervenors' application, and poses several questions she
5 would like answered by intervenors or the county. The
6 document does not include a certificate of service and in
7 fact was served only on LUBA.

8 On or after January 1, 1996, without any notice that
9 the county's decision had been appealed, intervenors
10 commenced construction plans for their residence, including
11 hiring and scheduling contractors.

12 On January 16, 1996 LUBA received an "Amended Notice of
13 Intent to Appeal." That "Amended Notice" included several
14 additional objections and questions regarding the county's
15 approval, but also included, in substantial form and
16 content, the requirements of OAR 660-10-015 for the filing

following the 19-page guidelines. I have not read the 19
pages.

* * * * *

"It is now 7 a.m. and I have been up all night trying to get my
materials together for the appeal. In 10 hours I must have
submitted my Notice of Appeal to all parties. As I see it, I
have two choices: read the 19 pages and have no time to submit
any material, or state my case and my displeasure with the
unlevel playing field of the County Commissioners' appeal
process." (Emphasis added.)

The "19-page guidelines" to which petitioner refers is LUBA's appeal
packet, which includes OAR 660-10-000 et. seq. (LUBA's rules of procedures
for appeals), answers to commonly asked questions regarding appeals and
sample forms. The requirements for a Notice of Intent to Appeal are on the
second page of the rules, and one of the sample forms is a Notice of Intent
to Appeal.

1 of a Notice of Intent to Appeal. That document was served,
2 along with the original document, on the county and
3 intervenors on January 16, 1996.

4 Intervenor move to dismiss this appeal for
5 petitioner's failure to timely file an adequate notice of
6 intent to appeal and failure to provide adequate service to
7 the county and intervenors.

8 OAR 661-10-015(1) requires that a notice of intent to
9 appeal be filed within 21 days of the date the local
10 government makes a final land use decision.² OAR 661-10-
11 015(2) requires that the Notice of Intent to Appeal be
12 served on specified parties on or before the filing
13 deadline.³ OAR 661-10-015(3) specifies the required

²OAR 661-10-015(1) requires:

- (a) The Notice, together with two copies and the filing fee and deposit for costs * * * shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final * * *. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.
- (b) Filing of a notice of intent to appeal with the Board shall be accomplished when the Notice, accompanied by payment of the filing fee and deposit * * * is delivered to or received by the Board on or before the date due.
*_*_*"

³OAR 661-10-015(2) requires:

"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 * * * on or before the date the notice of intent to appeal is required to be filed."
(emphasis added.)

1 contents of the Notice of Intent to Appeal.⁴

2 The timely filing of a notice of intent to appeal a
3 local decision to LUBA is jurisdictional. Hence, failure to
4 file a timely appeal mandates dismissal of the appeal. See
5 e.g., Pilling v. Crook County, 23 Or LUBA 51 (1992); Crew v.
6 Deschutes County, 23 Or LUBA 148 (1992) (Appeal filed with
7 LUBA more than 21 days after the date the challenged
8 decision became final must be dismissed.)

9 However, while timely filing of a notice of intent to
10 appeal is jurisdictional, conformance with all of the
11 substantive requirements for the content and service of the

⁴OAR 661-10-015(3) requires:

"Contents of Notice: The Notice shall be substantially in the form set forth in Exhibit 1 and shall contain:

"(a) A caption which sets forth the name(s) of the person(s) filing the Notice; identifying the person(s) as petitioner(s), and the name of the governing body, identifying the governing body as respondent;

"(b) Below the caption the heading 'Notice of Intent to Appeal';

"(c) The full title of the decision to be reviewed as it appears on the final decision;

"(d) The date the decision to be reviewed became final;

"(e) A concise description the decision to be reviewed;

"(f) The name, address and telephone number of each of the following

"* * * * *

"[including petitioner, governing body, applicant, and other persons to whom written notice of the decision had been provided.]"

1 notice of intent to appeal is not. Rather, LUBA has held
2 that "technical" violations of its rules do not justify
3 dismissal of an appeal unless another party establishes it
4 has been prejudiced by the violations. Davenport v. City of
5 Tigard, 23 Or LUBA 679 (1992). See also, Testa v. Clackamas
6 County, 29 Or LUBA 577 (1995); Fraser v. City of Joseph, 27
7 Or LUBA 695 (1994).

8 Petitioner submitted a document, which she identified
9 as a notice of intent to appeal, within 21 days of the date
10 the county made a final decision on intervenors'
11 application. Thus, if the document constituted a notice of
12 intent to appeal, she would have satisfied OAR 661-10-
13 015(1). However, the document did not purport to and, in
14 fact, did not conform to the any of the requirements for
15 content or service of a notice of intent to appeal. The
16 question then is whether the document petitioner filed
17 constituted a "notice of intent to appeal" as that term is
18 applied in the jurisdictional requirement of OAR 661-10-
19 015(1).

20 Petitioner's December 22, 1995 document wholly failed
21 to satisfy the requirements a notice of intent to appeal, as
22 set forth in OAR 661-10-015(3), to the point where this
23 Board could not process the appeal, and no other party could
24 effectively participate. For example, without petitioner's
25 address, and the names and addresses of the county counsel
26 and applicant, LUBA could not properly inform essential

1 parties that an appeal had been filed. Because the document
2 petitioner filed did not evidence even an attempt to satisfy
3 any of the substantive requirements for a notice of intent
4 to appeal and did not include sufficient information to
5 enable this Board to process the appeal, the document
6 submitted by petitioner on December 22, 1995 does not
7 constitute a notice of intent to appeal. Petitioner's
8 failure to file a notice of intent to appeal as that term is
9 used in OAR 661-10-015(1) mandates dismissal of the appeal.

10 Moreover, even if the document could be construed to be
11 a notice of intent to appeal, the violations of OAR 661-10-
12 015(3) are so egregious as to warrant dismissal of the
13 appeal. Petitioner's failure to comply with the
14 requirements for the content of the notice of intent to
15 appeal to such an extent that others are precluded from
16 effectively participating in the appeal, per se prejudices
17 all other parties.

18 Finally, petitioner's failure to timely serve other
19 interested and essential parties further warrants dismissal
20 of the appeal. Again, LUBA has excused minor delays in the
21 service of a notice of intent to appeal, absent a showing of
22 prejudice. See e.g., Williams v. City of Philomath, 29 Or
23 LUBA 563 (1995). (A two day delay in serving notice of
24 intent to appeal on respondent does not establish prejudice,
25 and can be excused.) However, in this case, the service was
26 not provided until 22 days after the deadline as required by

1 OAR 661-10-015(2). During the interim, intervenors had
2 proceeded with construction plans in reliance on a local
3 government approval which, to their knowledge, had not been
4 appealed. Petitioner's substantial delay in serving
5 intervenors and the county prejudiced intervenors, and
6 cannot be excused.

7 Petitioner's "amended notice of intent to appeal",
8 filed January 16, 1996, substantially conformed to the
9 substantive requirements of OAR 661-10-015(2) and (3) for a
10 notice of intent to appeal. However, that notice was filed
11 43 days after the local decision and, therefore, did not
12 satisfy the filing deadline mandated by OAR 661-10-015(1).

13 The appeal is dismissed.