

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

3  
4                                   ANNUNZIATA GOULD,  
5   *Petitioner,*

6  
7   vs.

8  
9                                   DESCHUTES COUNTY,  
10    *Respondent.*

11  
12   LUBA No. 2021-112

13  
14   ORDER

15            Petitioner appeals a board of county commissioners decision denying  
16 review of a hearings officer decision approving a tentative plan, site plan review,  
17 and site plan review application modification for phased development of a  
18 destination resort, on remand from *Gould v. Deschutes County*, 79 Or LUBA 561  
19 (2019), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021).

20            **MOTION TO INTERVENE**

21            On November 16, 2021, petitioner filed the notice of intent to appeal  
22 (NITA). On December 8, 2021, Central Land and Cattle Company, LLC (CLCC),  
23 the applicant below, filed a motion to intervene on the side of the county. On  
24 December 22, 2021, petitioner filed a response to CLCC’s motion to intervene.  
25 On January 3, 2022, CLCC filed a reply to petitioner’s response and a motion to  
26 dismiss and alternative motion to compel service. On January 12, 2022, petitioner  
27 filed a surreply to CLCC’s reply.

1           Petitioner argues that CLCC’s motion to intervene was untimely filed and  
2 must be denied. A motion to intervene must be filed within 21 days of the date  
3 on which the NITA is filed. ORS 197.830(7)(a); OAR 661-010-0050(2).<sup>1</sup> The  
4 21-day deadline for filing motions to intervene is strictly enforced. *Housing Land*  
5 *Advocates v. City of Happy Valley*, 73 Or LUBA 405, 407 (2016) (citing *Grahn*  
6 *v. City of Newberg*, 49 Or LUBA 762, 766 (2005)). For purposes of the 21-day  
7 intervention deadline, a NITA is “filed” when it is served on the would-be  
8 intervenor. *Oakleigh-McClure Neighbors v. City of Eugene*, 269 Or App 176,  
9 188, 344 P3d 503 (2015). OAR 661-010-0075(2)(b)(B) provides that “[s]ervice

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<sup>1</sup> ORS 197.830(7) provides:

- “(a) Within 21 days after a [NITA] has been filed with the board under subsection (1) of this section, any person described in paragraph (b) of this subsection may intervene in and be made a party to the review proceeding by filing a motion to intervene and by paying a filing fee of \$100.
- “(b) 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 or to pay the filing fee set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene.”

1 may be in person, or by first-class mail. Mail service is complete on deposit in  
2 the mail.” Under OAR 661-010-0015(2) and (3)(f), the NITA must be served on  
3 the following persons, among others:

4 “(C) The applicant, if any (and if other than the petitioner). *If an*  
5 *applicant was represented by an attorney before the*  
6 *governing body, then \* \* \* the applicant’s attorney shall also*  
7 *be included;*

8 “(D) Any other person to whom written notice of the land use  
9 decision or limited land use decision was mailed, either  
10 through the United States Postal Service or by electronic mail,  
11 *as shown on the governing body’s records.”* OAR 661-010-  
12 0015(3)(f) (emphases added).

13 During the local proceedings, CLCC was represented by two different  
14 attorneys at separate law offices: Fancher, whose office is located in Bend, and  
15 Katzaroff, whose office is located in Seattle and who filed the disputed motion to  
16 intervene on behalf of CLCC. The body of the NITA lists the name and contact  
17 information for CLCC in Redmond and the names and contact information for  
18 Fancher and Katzaroff. Exhibit A to the NITA is a list of “persons mailed or  
19 emailed written notice of the land use decision by Deschutes County, as indicated  
20 by its records.” NITA 3. That list includes two addresses for CLCC, one in Texas  
21 and one in Redmond; an address for Fancher in Bend; and an address for  
22 Katzaroff in Seattle. The NITA includes a certificate of service indicating that  
23 petitioner’s attorney served the NITA on CLCC and both of its attorneys on  
24 November 16, 2021, by mailing service copies of the NITA via first-class mail

1 to four separate addresses: CLCC’s addresses in Redmond and Texas, Fancher’s  
2 address in Bend, and Katzaroff’s address in Seattle.

3 OAR 661-010-0015(3)(f)(C) requires service of the NITA on the applicant  
4 and on the applicant’s attorney. CLCC does not dispute that CLCC, as an entity,  
5 received a service copy of the NITA. CLCC does not dispute that petitioner  
6 mailed service copies of the NITA to accurate addresses for Katzaroff and CLCC.  
7 CLCC also concedes that Katzaroff and Fancher in fact received service copies  
8 of the NITA.<sup>2</sup> CLCC relies on the November 17, 2021, postmark on the envelope  
9 of a service copy that Katzaroff received and argues that petitioner served the  
10 NITA on CLCC on November 17, 2021. Therefore, CLCC argues, CLCC’s  
11 motion to intervene was timely filed 21 days later on December 8, 2021. In the  
12 alternative, CLCC argues that petitioner failed to serve Fancher at Fancher’s  
13 correct address and that that service error tolled the time for CLCC to file a  
14 motion to intervene until after Fancher is served with a copy of the NITA at  
15 Fancher’s correct address.

16 Petitioner argues that they served the NITA on CLCC, Fancher, and  
17 Katzaroff, by depositing the service copies in the mail on November 16, 2021.  
18 Petitioner argues that, because all the required copies of the NITA were served

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<sup>2</sup> In its motion to intervene, CLCC states that “[t]he NITA sent to Ms. Fancher was postmarked as mailed on November 17, 2021.” Motion to Intervene 2 n 1. We understand that statement to mean that Fancher has in fact received at least one service copy of the NITA.

1 by first-class mail on November 16, 2021, the 21-day intervention deadline for  
2 CLCC expired on December 7, 2021. Because CLCC filed its motion to intervene  
3 on December 8, 2021, 22 days after the NITA was served on CLCC by mail  
4 deposit, petitioner argues that CLCC’s motion to intervene was untimely filed  
5 and must be denied. We agree with petitioner for reasons explained below.

6 **A. Deposit in the Mail**

7 The primary issue presented by the parties’ dispute is whether the postmark  
8 date on the envelope of a service copy of a NITA is conclusive evidence of the  
9 date on which the service copy was deposited in the mail for purposes of OAR  
10 661-010-0075(2)(b)(B). CLCC asserts that “[t]he most probative proof of date of  
11 service is the actual date stamp from the United States Postal Service.” Reply to  
12 Response to Motion to Intervene 3 (underscoring in original).

13 We conclude that, in the circumstances presented here, petitioner’s  
14 certificate of service and additional declarations, rather than the postmark date  
15 on the envelope of the service copy, is proof of the date on which the service copy  
16 of the NITA was deposited in the mail. Accordingly, we agree with petitioner  
17 that the NITA was served on CLCC on November 16, 2021.

18 *Greenwood v. Polk County*, 11 Or LUBA 408 (1984), is instructive. In that  
19 case, the respondents moved to dismiss the appeal for failure to timely file the  
20 petition for review. Our rules provide that the petition for review is due 21 days  
21 after the date on which the record is received by LUBA and that failure to timely  
22 file the petition for review shall result in dismissal of the appeal. OAR 661-010-

1 0030(1). At the time of *Greenwood*, our rules provided that most documents were  
2 “filed” if they were “[m]ailed on or before the date due by first class mail with  
3 the United States Postal Service.” OAR 661-010-0075(5)(a)(B) (Oct 3, 1983).  
4 Also at the time of *Greenwood*, like today, our rules provided that “[s]ervice may  
5 be in person or by first-class mail. Service by United States Postal Service mail  
6 is complete on deposit in the mail.” OAR 661-010-0075(5)(b)(B) (Oct 3, 1983).

7 In *Greenwood*, the petition for review was due on March 20, 1984. The  
8 envelope in which the petition for review was mailed to LUBA was postmarked  
9 March 21, 1984. Based on the postmark date, the respondents argued that the  
10 petition for review was untimely filed, and they moved to dismiss the appeal.  
11 Because the petition for review was accompanied by an affidavit of the  
12 petitioners’ attorney, which stated that the petition for review was deposited in  
13 the U.S. mail on March 20, 1984, we concluded that the petition for review was  
14 timely filed notwithstanding the postmark date. We explained:

15 “Depositing with the U.S. Postal Service \* \* \* is a filing under  
16 LUBA rules, and therefore depositing a petition for review in the  
17 U.S. mail within the time allowed by LUBA rules for filing a  
18 petition is sufficient. *We recognize mail is not picked up from postal  
19 service deposit boxes and time stamped immediately after being  
20 placed in a mail deposit box.* Further, our rules do not place  
21 particular reliance upon date stamps appearing on envelopes. *The  
22 critical issue is the date the documents were deposited in the U.S.  
23 mail.*” *Greenwood*, 11 Or LUBA at 409 (emphases added).

24 *Bollinger v. City of Hood River*, 46 Or LUBA 602 (2004), is also  
25 instructive. In that case, the petition for review was due on February 12, 2004.

1 Because the envelope in which the petition for review was mailed to LUBA was  
2 postmarked 12:03 a.m. on February 13, 2004, the intervenor-respondent argued  
3 that the petition for review was untimely filed, and they moved to dismiss the  
4 appeal. The petition for review was accompanied by an affidavit of the  
5 petitioners' attorney, which stated that the petition for review was delivered to  
6 the post office clerk at 11:58 p.m. on February 12, 2004. We explained that we  
7 did not agree with the intervenor-respondent "that the February 13, 2004  
8 postmark [was] either conclusive proof of the date the petition for review was  
9 filed by mail under our rules or the only reliable evidence of the date of filing."  
10 *Bollinger*, 46 Or LUBA at 605-06. We accepted for purposes of our opinion that  
11 the petition for review was filed when it was delivered to the post office clerk.  
12 However, we concluded that the petitioners did not provide sufficient evidence  
13 to support their contention that the petition for review was in fact delivered to the  
14 post office clerk on February 12, 2004. We explained, "If [the petitioners'  
15 attorney] was relying on his own watch, it could easily have been two minutes  
16 slow. Even if he was relying on a post office clock, that clock could also have  
17 been at least two minutes slow." *Id.* at 606. Accordingly, we concluded that the  
18 petition for review was untimely filed, and we dismissed the appeal.

1            *Greenwood* and *Bollinger* illustrate that the postmark date is not in all  
2 cases the most probative or conclusive proof of when something was mailed.<sup>3</sup>

3            The certificate of service attached to the NITA states that the NITA was  
4 served on CLCC and both of its attorneys on November 16, 2021, by first-class  
5 mail. Petitioner’s attorney’s declaration states that the attorney deposited the  
6 service copies in the U.S. mail shortly after 12:55 p.m. on November 16, 2021.  
7 CLCC has presented no evidence that contradicts or calls into question that  
8 declaration. The postmark does not call that declaration into question because, as  
9 we recognized in *Greenwood*, “mail is not picked up from postal service deposit  
10 boxes and time stamped immediately after being placed in a mail deposit box.”  
11 Or LUBA at 409. We conclude that petitioner has carried their burden to  
12 establish that they served the NITA on CLCC on November 16, 2021.

13            **B.     Service Addresses**

14            CLCC argues, in the alternative, that petitioner failed to serve Fancher at  
15 Fancher’s correct address and that that service error tolled the time for CLCC to  
16 file a motion to intervene until after Fancher is served with a copy of the NITA  
17 at Fancher’s correct address. Reply to Response to Motion to Intervene 3-5, 8. It

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<sup>3</sup> In 2010, our rules were amended to provide, “If the date of mailing is relied upon as the date of *filing*, the date of the first class postmark on the envelope mailed to the Board is the date of filing.” OAR 661-010-0075(2)(a)(B)(i) (emphasis added). However, our rules for *servicing* documents were not similarly amended. Mail service remains “complete on deposit in the mail.” OAR 661-010-0075(2)(b)(B).



1 is undisputed that petitioner mailed a service copy of the NITA to Fancher at the  
2 address that is listed in the county's records and that Fancher in fact received a  
3 service copy of the NITA in an envelope postmarked November 17, 2021. Motion  
4 to Intervene 2 n 1. CLCC asserts that the local record includes an address for  
5 Fancher that is different from the address to which petitioner mailed Fancher the  
6 service copy of the NITA, as listed in the body of the NITA and Exhibit A. CLCC  
7 argues that OAR 661-010-0015(3)(f)(C) does not permit a petitioner to rely on  
8 the address that is listed in the governing body's records for purposes of serving  
9 the NITA on the applicant's attorney. According to CLCC, OAR 661-010-  
10 0015(3)(f)(D) permits a petitioner to rely on the address that is listed in the  
11 governing body's records, but only for purposes of serving the NITA on persons  
12 other than the governing body, the governing body's legal counsel, the applicant,  
13 and the applicant's attorney.

14 Petitioner replies, and we agree, that a petitioner may rely on the address  
15 that is listed in the governing body's records for purposes of serving the NITA  
16 on applicant's attorney. OAR 661-010-0015(3)(f)(C) does not specify the source  
17 of the address for the applicant and the applicant's attorney. OAR 661-010-  
18 0015(3)(f)(D) provides that the petitioner must serve a copy of the NITA on  
19 "[a]ny other person to whom written notice of the land use decision or limited  
20 land use decision was mailed, either through the United States Postal Service or  
21 by electronic mail, as shown on the governing body's records." The phrase "any  
22 other person" in subparagraph (D) does not limit a petitioner's ability to rely on

1 the governing body’s record of addresses where the local government mailed  
2 written notice of the challenged decision with respect to service contact  
3 information for the applicant’s attorney, as required by subparagraph (C).  
4 Instead, the phrase “any other person” simply specifies another category of  
5 persons who are entitled to service of the NITA.

6 Parties to local proceedings are responsible for providing their contact  
7 information to the local government, and the local government is responsible for  
8 maintaining its own record of contact information. Even if the local record  
9 includes multiple addresses for the applicant or the applicant’s attorney, as CLCC  
10 asserts is true for Fancher, a petitioner is generally entitled to rely on the local  
11 government’s mailing list demonstrating the addresses to which the local  
12 government mailed notice of the final land use decision.

13 We conclude that petitioner served the NITA on CLCC and both of its  
14 attorneys on November 16, 2021. Accordingly, CLCC’s motion to intervene was  
15 due on December 7, 2021. Because CLCC filed its motion to intervene on  
16 December 8, 2021, the motion to intervene is untimely and must be denied.

17 The motion to intervene is denied.<sup>4</sup>

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<sup>4</sup> Because we deny CLCC’s motion to intervene, we do not consider its motion to dismiss and alternative motion to compel service.

1 **RECORD OBJECTIONS**

2 On December 9, 2021, LUBA received the original record in this appeal.  
3 On December 23, 2021, petitioner filed record objections. On January 24, 2022,  
4 LUBA received an amended record and a status report from the county indicating  
5 that the amended record is intended to resolve all of petitioner’s record  
6 objections. No party objects to the amended record. The objections are therefore  
7 sustained and resolved. The Board and the parties shall refer to the amended  
8 record.

9 **BRIEFING SCHEDULE**

10 The record is settled as of the date of this order. The petition for review  
11 shall be due 21 days after the date of this order.<sup>5</sup> The response brief shall be due  
12 42 days after the date of this order. The final opinion and order shall be due 77  
13 days after the date of this order.

14 Dated this 25th day of February 2022.

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H. M. Zamudio  
Board Chair

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<sup>5</sup> Petitioner filed the petition for review on February 14, 2022, before the record was settled and before the briefing schedule was set. Petitioner has withdrawn that petition for review.