

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

3
4 STEVEN SMITH,
5 *Petitioner,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2022-034

13
14 ORDER

15 **NOTICE OF INTENT TO APPEAL**

16 On April 11, 2022, the Board received petitioner’s notice of intent to
17 appeal (Original NITA). The Original NITA does not comply with OAR 661-
18 010-0015 in four respects.

19 **A. Original NITA Appeals Two Decisions**

20 The Original NITA identifies more than one decision as the subject of the
21 appeal. The Original NITA describes the appealed decisions as
22 “ADMINISTRATIVE ACTION OF DOUGLAS COUNTY PLANNING
23 DIRECTOR, which became final on February 4, 2002 and which involves a land
24 partition, and Douglas County’s denial of Petitioner’s local appeal which became
25 final on March 23, 2022.” Original NITA 1 (internal cites omitted). Where a
26 NITA attempts to appeal two separate land use decisions, our rules allow the
27 petitioner to elect to file an additional notice of intent to appeal and filing fee if

1 that can be accomplished without prejudice to other parties' substantial rights.
2 OAR 661-010-0005; OAR 661-010-0015(1)(d).

3 Within 14 days of the date of this order petitioner must either (1) notify the
4 Board in writing that they elect to appeal only one decision, and identify which
5 decision; or (2) submit a new, separate notice of intent to appeal (Second NITA)
6 and separate filing fee for the appeal of the additional decision. If petitioner
7 chooses to file a Second NITA, that Second NITA must also comply with all of
8 the requirements in OAR 661-010-0015(2) and (3), as explained below.¹

9 **B. Applicant and Any Applicant Attorney Information Missing**

10 A notice of intent to appeal must include the name, address and telephone
11 number of the applicant, and if the applicant was represented by an attorney
12 before the governing body, then the name, address and telephone number of the
13 applicant's attorney must also be included in the notice. OAR 661-010-
14 0015(3)(f)(C). The Original NITA does not contain the address and telephone
15 number of the applicant, as required by OAR 661-010-0015(3)(f)(C). In addition,
16 the Original NITA states it is "unknown" to petitioner whether the applicant was
17 represented by an attorney before the governing body. Original NITA 2.

¹ In the event petitioner chooses to file a Second NITA, the Board will likely consolidate the appeals, and require the respondent to file a consolidated record.

1 **C. Names and Addresses of Other Persons Mailed Written Notice**
2 **of the Decision**

3 A notice of intent to appeal must contain the names and addresses for all
4 other persons to whom the county mailed written notice of the land use decision,
5 as shown on the governing body’s records, as required by OAR 661-010-
6 0015(3)(f)(D). The Original NITA does not contain that information. Petitioner
7 states that petitioner “has requested such list from Douglas County but has not
8 received it.” Original NITA 2.

9 **D. Service of the Original NITA and Proof of Service of the**
10 **Original NITA**

11 A notice of intent to appeal must be contemporaneously served on, and
12 include proof of service upon, all persons required to be named in the notice, as
13 required by OAR 661-010-0015(2) and (3)(i), and OAR 661-010-0075(2)(b). The
14 Original NITA does not include proof of service upon such persons and,
15 consequently, petitioner has not demonstrated that such persons were served with
16 the Original NITA as required by OAR 661-010-0015(2) and OAR 661-010-
17 0075(2)(b).

18 **MOTION TO STAY SERVICE**

19 On April 12, 2022, the Board received petitioner’s Motion to Stay Service
20 Upon Certain Persons in which petitioner “moves to temporarily stay service
21 upon persons ordinarily required to be served with the notice.” In that motion, we
22 understand petitioner to request that they be “temporarily” exempted from the
23 requirement in OAR 661-010-0015(2) to serve all persons required to be served

1 with the notice of intent to appeal until the Board resolves the merits of their
2 appeal. Motion to Stay Service 1, 10.

3 Service on all persons entitled to service of the notice of intent to appeal is
4 required under OAR 661-010-0015(2).² Accordingly, petitioner's motion is
5 denied. *Bruce v. City of Hillsboro*, 32 Or LUBA 382, 387 (1997) (a party cannot
6 unilaterally impose conditions on compliance with LUBA's rules). Service of the
7 notice is also a jurisdictional requirement. *Bright v. City of Yachats*, 16 Or LUBA
8 161, 164 (1987). Failure to serve all persons entitled to be served with the NITA
9 will result in dismissal of the appeal. *Bruce*, 32 Or LUBA at 387.

10 The motion also sets out facts and argument on the merits of one of the
11 appealed decisions. Arguments on the merits of the appeal are premature at this
12 stage in the proceeding. The Board will not consider the merits of the arguments
13 in the motion to stay service.

14 **CONCLUSION**

15 Within 14 days of the date of this order, petitioner shall either (1) notify
16 the Board in writing that they elect to appeal only one decision, and identify
17 which decision; or (2) submit a Second NITA and separate filing fee for the
18 appeal of the additional decision. If petitioner chooses to file a Second NITA,

² For purposes of determining the timeliness of a motion to intervene, a notice of intent to appeal is effectively filed on the date the notice is served on a person required to be served under OAR 661-010-0015(2). ORS 197.830(7); *Oakleigh-McClure Neighbors v. City of Eugene*, 269 Or App 176, 188, 344 P3d 503 (2015).

1 that second NITA must also comply with all of the requirements in OAR 661-
2 010-0015(3) and be served as required by OAR 661-010-0015(2) and OAR 661-
3 010-0075(2)(b).

4 In addition, within 14 days of the date of this order, petitioner shall file
5 with LUBA an original and two copies of a corrected Original NITA that
6 conforms with OAR 661-010-0015, as detailed above. Petitioner shall
7 contemporaneously serve copies of the corrected Original NITA upon all persons
8 required to be named in and served with the Original NITA and include with the
9 corrected Original NITA proof of such service.

10 If the corrected Original NITA (and a Second NITA, if applicable) is not
11 filed and served on all parties required to be served within the time set forth in
12 this order, the Board will dismiss the appeal. *Wendt v. City of Klamath Falls*, ___
13 Or LUBA ___ (LUBA No 2020-026, Mar 18, 2020), *aff'd*, 304 Or App 874, 466
14 P3d 106 (2020).

15 Dated this 13th day of April 2022.

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21 H. M. Zamudio
Board Chair