

1 REYNOLDS, Chief Referee.

2 ORDER ON MOTIONS TO DISMISS

3 Respondent Metropolitan Service District (Metro) has moved
4 to dismiss the above captioned matter on the following grounds:

5 (1) Neither the Notice of Intent to Appeal nor
6 the amended Notice of Intent to Appeal was signed by
7 the petitioners or petitioners' attorney. Rather,
8 both notices were signed by one Jean Baker, not an
9 attorney, as the "Representative of Petitioners,"
10 contrary to ORS 9.320.

11 (2) Neither the Notice of Intent to Appeal nor
12 the amended Notice of Intent to Appeal adequately
13 identifies which land use decision is being appealed,
14 and petitioners have joined more than one land use
15 decision in each notice.

16 (3) The Notice of Intent to Appeal fails to
17 identify three of the four land use decisions made by
18 Oregon City.

19 (4) The amended Notice of Intent to Appeal fails
20 to provide the full title and a concise description of
21 the city's decision to grant a variance.¹

22 We conclude that the first basis urged by Metro for
23 dismissal of this appeal is well taken and, therefore, do not
24 address the other bases asserted by Metro. Metro contends that
25 both the Notice of Intent to Appeal (notice) and the amended
26 Notice of Intent to Appeal (amended notice) are fatally
defective because they are not signed by petitioners or
petitioners' attorney but are signed by Jean Baker, a
non-attorney, who has attempted to represent petitioners.
Metro says the absence of signatures of petitioners or their
attorney on either the notice or amended notice contravenes ORS
9.320 which provides:

1 "Any action, suit or proceeding may be prosecuted
2 or defended by a party in person or by an attorney
3 except that...a corporation appears by attorney in all
4 cases..."

5 An answer and memorandum in response to the motion to
6 dismiss was signed by Jean Baker and the individually named
7 petitioners and filed with the Board on August 25, 1981. It is
8 stated in the answer that Jean Baker is co-chair of Oregonians
9 for Clean Air and signed the notice and amended notice for her
10 organization. Affidavits were attached to the answer by which
11 the individually named petitioners stated that they "approve
12 and adopt the notice of intent to appeal and the amended notice
13 of intent to appeal on file herein." In her affidavit, Jean
14 Baker states she had been "authorized" by her organization to
15 "execute any and all documents necessary for the appeal of the
16 land use decision identified in the amended notice of intent to
17 appeal." The answer also asserts that the motion to dismiss
18 was not filed within ten days of the date of filing the Notice
19 of Intent to Appeal and should, therefore, not be considered.

20 Before discussing the merits of the motion, a brief
21 statement of facts is in order. On July 23, 1981, a Notice of
22 Intent to Appeal was filed with the Board setting forth in the
23 caption the names James D. Curtis and Oregonians for Clean Air
24 as the petitioners. In paragraph II of the notice it is stated
25 that petitioner Curtis "temporarily represents himself" and
26 "petitioners, Oregonians for Clean Air, also temporarily
represent themselves." The body of the notice also states that

1 Oregon City mailed written notice of the proceedings to "James
2 Fitting, attorney for James D. Curtis" and to "John Mayfield,
3 attorney for Roma and Virgil Wridge." At the end of the notice
4 appeared the signature of "Jeanette (Jean) Baker" on the
5 signature line immediately below which read "Representative of
6 Petitioners." Immediately above her signature was the
7 signature line, left blank, for "Attorney for Petitioners."
8 Below Ms. Baker's signature appeared a "Certificate of Service"
9 signed by Ms. Baker, in which Ms. Baker certified service of
10 the notice had been made on all persons listed in paragraph II
11 of the notice. This service would have included service on
12 Metro, Oregon City, as well as James Fitting and John
13 Mayfield. However, attached to the notice was an "Acceptance
14 of Service" which indicated only Metro had been served with a
15 copy of the notice.

16 The secretary to this Board telephoned Ms. Baker to inform
17 her that according to LUBA rules (1) only an attorney could
18 represent petitioners and (2) service of the notice had to be
19 made on all persons listed in the notice. A follow up letter
20 concerning the telephone call was sent by the Board to Ms.
21 Baker and to attorneys for Metro and Oregon City. This letter
22 stated Ms. Baker had advised the Board she was aware of the
23 rule concerning attorney representation and she had merely
24 signed her name as "transmitter" of the notice. The Board's
25 letter also indicated Ms. Baker had stated she would correct
26 the matter of the certificate of service.

1 On August 10, 1981, the Board received an amended Notice of
2 Intent to Appeal (amended notice), again signed "Jean Baker,
3 Representative of Petitioners." The amended notice added as
4 petitioners Roma and Virgil Wridge. In the body of the notice
5 appeared the following statement:

6 "Petitioners James D. Curtis, Roma and Virgil
7 Wridge and Oregonians for Clean Air temporarily
8 represents (sic) themselves."

9 A cover letter accompanied the amended notice addressed to the
10 Board's secretary who had earlier spoken with Ms. Baker on the
11 telephone. That letter stated the following:

12 "Enclosed is our amended Notice of Intent to
13 Appeal, suggested by you during our recent
14 conversation regarding errors in siting (sic) the
15 conditions.

16 "Subsequent to our discussion, members of
17 Oregonians for Clean Air received through James
18 Fitting, attorney for petitioner James Curtis, a
19 notice from the city regarding this matter. That
20 notice, later identified as the official 'decision',
21 was dated July 9, 1981. We originally considered that
22 the city would have immediately written their opinion,
23 decision and findings, but that was not the case.
24 This is the ONLY document which is written and fits
25 the description within the LUBA rules for a
26 'decision'. We therefore are amending the date.

27 "Attorney John Mayfield, attorney for petitioners
28 Roma and Virgil Wridge as well as the Wridges were
29 vacationing and could not be reached for their
30 approval of the Wridges being included as
31 petitioners. While Mayfield is still vacationing, the
32 Wridges would like to be included.

33 "We have added the precise language of the
34 conditional use permits and variance, seeking to
35 clarify our appeal rather than complicate it.

36 "Should there be any additional need for
37 discussion regarding the appeal, please contact me."
38 (Emphasis added).

1 Two days after filing the amended notice, respondent Metro
2 filed its motion to dismiss.

3 OPINION

4 Metro's motion to dismiss is, in essence, a motion directed
5 to the jurisdiction of this Board. As such, the motion is not
6 subject to the ten day requirement set forth in LUBA Rule
7 14(B). See: Grant County v Oregon Dept. of Fish and Wildlife,
8 1 Or LUBA 214 (1980).

9 In McCrystal v Polk County, 1 Or LUBA 142, 143 (1980) we
10 said that appeals before this Board are "proceedings" within
11 the meaning of ORS 9.320, and that

12 "***in any such proceeding, a party may represent
13 himself or be represented by an attorney. Persons who
14 are not members of the Oregon State Bar (attorneys)
may not represent other persons or associations."

15 In McCrystal, Friends of Polk County, an association,
16 attempted to appear though its vice-president who was not a
17 member of the Oregon State Bar. We held that Friends of Polk
18 County had made no appearance and was not a party to the
19 proceeding.

20 We are forced to conclude in the present case that Jean
21 Baker was acting in a capacity far greater than a mere
22 "transmitter" of the notice and amended notice. Her actions
23 through and including filing the amended notice clearly show
24 she was attempting to represent not only Oregonians for Clean
25 Air but also petitioners James D. Curtis and Roma and Virgil
26 Wridge. She could not, however, represent Oregonians for Clean

1 Air before this Board whether or not she had authority from
2 that group to do so. As we said in McCrystal, Oregon law
3 permits associations and corporations to be represented in our
4 proceedings only through a member of the Oregon State Bar.
5 Oregonians for Clean Air has, therefore, made no appearance in
6 this appeal.

7 In a similar vein, neither James Curtis nor Roma and Virgil
8 Wridge have made an appearance in this proceeding, at least
9 until they filed affidavits in which they stated that they
10 approved and adopted the notice and amended notice. Jean Baker
11 attempted to act on their behalf until the filing of the
12 affidavits as much as she attempted to act on behalf of
13 Oregonians for Clean Air. She lacked authority under Oregon
14 Law to so act.

15 Even if, however, we were to treat the affidavits of Curtis
16 and the Wridges to breathe life into the notice and amended
17 notice through some theory of ratification, we could only do so
18 as of the date the affidavits were filed, which was August 25,
19 1981. Assuming the notice and amended notice were deemed as of
20 this date to bear the necessary signatures of the individual
21 petitioners, both the notice and amended notice would then not
22 be timely filed. The land use decision or decisions²
23 involved in this attempted appeal were final, if at all, on the
24 date Oregon City gave written notice of the city's action to
25 the parties. ORS 227.173; 1000 Friends v Clackamas County, 3
26 Or LUBA 233; LUBA Rule 3(C). The record indicates this

1 notification was given to Mr. Fitting and Mr. Mayfield,
2 attorneys for James Curtis and the Wridges respectively, on
3 July 22, 1981. This date is more than 30 days prior to the
4 date the affidavits were filed (August 25, 1981). Accordingly,
5 the notice and amended notice, if construed as perfected on the
6 day the affidavits were filed, were not timely filed with the
7 Board.³

8 For the foregoing reasons, we conclude we have no further
9 authority to act in this matter. This appeal is, therefore,
10 dismissed.

FOOTNOTES

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4 Metro included a fifth basis for dismissal, that the
5 amended Notice of Intent to Appeal was not timely filed. Metro
6 later withdrew this basis in view of its position that the
7 decisions of Oregon City became final on July 9, the day
8 written notice of the decisions were sent by Oregon City,
9 instead of June 25, the date the city council voted to approve
10 the decisions.

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12 In view of disposition of this appeal, it is unnecessary to
13 decide whether the city in fact, as Metro alleges, made four
14 land use decisions and those four land use decisions were
15 improperly joined in the notice or amended notice.

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17 At oral argument, we raised the issue of whether Oregon
18 City had taken any final action with respect to the three
19 conditional use permits and variance requested by the applicant
20 Metro. At the Board's request, the parties addressed this
21 issue in supplemental memoranda. Metro asserts that Oregon
22 City adopted written findings of fact and approved the
23 conditional use permits and variance at a public meeting.
24 Written notice of this action was mailed to the parties. This
25 was, according to Metro, all that was required of Oregon City
26 in order to have its action be deemed final for purposes of
review by this Board. Petitioners argue that there is no
"order in any sense of the word" as we held was required in
1000 Friends of Oregon v Clackamas County, ___ Or LUBA ___
(LUBA No. 81-031, 1981). Petitioners state:

27 "The jumble of minutes and uncertain
28 identification of findings of facts in the record in
29 this case cannot be said to be an order in any sense
30 of the word. There are no written findings as
31 required for proper review."

32 We do not resolve the issue of whether Oregon City's action
33 in this case amounted to a "final decision or determination."
34 In order for this Board to have jurisdiction, a proper notice
35 of intent to appeal had to be filed within 30 days of the date
36 the action was taken or at least written notification of that
action was mailed to the parties to this proceeding. If Oregon
City's action became final, it did so on July 22, 1981, the
date written notice was sent to the parties. As we have held

1 no proper notice was filed within 30 days, we have no authority
2 except to dismiss the appeal. As a practical matter it makes
3 little difference in terms of this Board's authority to act
4 whether the decision or decisions became final on July 22,
5 1981. If not final, we would still have no jurisdiction to
6 reach the merits of this appeal.
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