

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 OREGON COAST ALLIANCE,  
5 *Petitioner,*

6  
7 vs.

8  
9 CURRY COUNTY,  
10 *Respondent,*

11  
12 and

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14 CROOK FAMILY LLC, JAMES CROOK,  
15 MELODY CROOK and LEROY BLODGETT,  
16 *Intervenors-Respondents.*

17  
18 LUBA No. 2011-005

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20 OREGON SHORES CONSERVATION COALITION,  
21 *Petitioner,*

22  
23 vs.

24  
25 CURRY COUNTY,  
26 *Respondent,*

27  
28 and

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30 CROOK FAMILY LLC, JAMES CROOK,  
31 MELODY CROOK and LEROY BLODGETT,  
32 *Intervenors-Respondents.*

33  
34 LUBA No. 2011-006

35 ORDER ON MOTION TO DISMISS

36 The county and intervenors-respondents (respondents) move to dismiss LUBA No.  
37 2011-005, one of two consolidated appeals. Respondents argue that the notice of intent to  
38 appeal (NITA) filed in LUBA No. 2011-005 appealed a non-final planning commission  
39 decision that approves a destination resort, instead of the board of county commissioners'  
40 final decision that denied an appeal of the planning commission decision.

1           The planning commission issued a decision September 23, 2010, approving the  
2   disputed destination resort. Petitioner Oregon Coast Alliance (ORCA) appealed that  
3   planning commission decision to the board of county commissioners, which held a public  
4   hearing on the appeal on November 4, 2010. On December 28, 2010, the board of  
5   commissioners issued its final written decision denying the appeal and approving the  
6   destination resort. Notice of the commissioners' decision was mailed to the parties,  
7   including ORCA, on December 29, 2010, but that notice did not include a copy of the  
8   board's decision.

9           ORCA filed its NITA on January 14, 2011. The NITA identifies as the subject of  
10   appeal a decision entitled "In the matter of Planning Commission File No. DR -1001 for the  
11   approval of a Tentative Destination Resort Master Plan \* \* \* which became final on  
12   December 28, 2010." OAR 661-010-0015(3)(e) requires that the NITA include (1) a concise  
13   description of the decision to be reviewed, or (2) a copy of either the notice of decision or the  
14   decision to be reviewed. Attached to the NITA was a copy of the planning commission's  
15   September 23, 2010 decision.

16           Respondents argue that the subject of ORCA's NITA is clearly the September 23,  
17   2010 planning commission decision, not the board of county commissioners' final December  
18   28, 2010 decision, and that LUBA lacks jurisdiction for several reasons over any attempted  
19   appeal of the planning commission decision. Therefore, respondents argue, LUBA No.  
20   2011-005 should be dismissed.

21           ORCA responds that the intended subject of its NITA is the board of commissioners'  
22   December 28, 2010 decision, as evidenced by the fact that the NITA describes the challenged  
23   decision as becoming final on that date. ORCA argues that in preparing the NITA  
24   petitioner's attorney mistakenly believed that the board of county commissioners had simply  
25   adopted the planning commission's decision as its own, making that decision final as of  
26   December 28, 2010, rather than adopting a separate decision. ORCA argues that that

1 mistaken impression was strengthened by the fact the notice of the board of commissioners’  
2 decision did not include a copy of the decision itself and, according to ORCA, the only  
3 decision made available on the county’s website was the planning commission decision.  
4 ORCA argues that its mistake in mislabeling the challenged decision and attaching the  
5 planning commission decision to the NITA instead of either the notice of the board’s  
6 decision or the board’s decision itself was a “technical violation” of LUBA’s rules that did  
7 not prejudice the substantial rights of any party, and therefore should not interfere with  
8 LUBA’s review, under OAR 661-010-0005.<sup>1</sup>

9 We have held that where there is reasonable dispute regarding which of two  
10 documents or decisions is appealable to LUBA, the NITA identifies both documents, but  
11 mistakenly identifies the wrong document as the appealable decision, LUBA will regard that  
12 mistake as a technical pleading error, treat the appealable decision as the subject of the  
13 NITA, and not dismiss an otherwise properly filed appeal. *Golden v. City of Silverton*, \_\_ Or  
14 LUBA \_\_ (LUBA No. 2008-031, Order, October 29, 2008), slip op 2; *Comrie v. City of*  
15 *Pendleton*, 45 Or LUBA 758, 776 (2003); *Kent v. City of Portland*, 39 Or LUBA 455, 459-60  
16 (2001). In *Kent*, LUBA cited *Hilliard v. Lane County Commr’s.*, 51 Or App 587, 595, 626  
17 P2d 905 (1981), for the proposition that LUBA may not invoke technical requirements of  
18 pleading having no statutory basis, and *Coats v. Crook County*, 18 Or LUBA 344, 350 n 9  
19 (1989), for the proposition that LUBA may not dismiss appeals based on technical pleading

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<sup>1</sup> OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1), or a petition for review under OAR 661-010-0030(1) is not a technical violation.”

1 requirements.

2       The facts in *Golden* and *Comrie* were somewhat similar to the present case. In  
3 *Golden*, the NITA identified as the subject of appeal a non-final resolution that was never  
4 adopted. However, from other statements in the NITA it was clear that the actual intended  
5 target of the appeal was the city's denial of the petitioners' local appeal, and LUBA treated  
6 the NITA accordingly, denying the motion to dismiss. Similarly, in *Comrie*, the petitioner  
7 mistakenly appealed a February 21, 2003 planning commission decision rather than the June  
8 9, 2003 city council decision rejecting his local appeal of the planning commission decision.  
9 We elected to treat the NITA as appealing the only appealable decision identified in the  
10 NITA, the June 9, 2003 city council decision rejecting the petitioner's local appeal.

11       We believe the present case is similar enough to *Golden* and *Comrie* to warrant the  
12 same treatment. ORCA clearly wished to appeal the county's final decision on the disputed  
13 destination resort application, which the NITA correctly identified as becoming final on  
14 December 28, 2010. Petitioner mistakenly believed that the board of commissioners had  
15 simply adopted the planning commission decision as its own and attached to the NITA what  
16 it believed to be the substance of the county's final decision, an option allowed under our  
17 rules. There is zero reason to believe that petitioner wished to appeal to LUBA the planning  
18 commission decision, in isolation, because petitioner had filed a local appeal of that decision  
19 to the board of commissioners, and the planning commission decision standing on its own  
20 was clearly not an appealable decision. Dismissing petitioner's appeal based on that error  
21 would amount to dismissing the appeal based on a technical pleading error.

22       Just as importantly, we view the error as a procedural error at most, and respondents  
23 identify no prejudice to any parties' substantial rights from petitioner's error. With respect to  
24 service of the NITA, the filing of the record, and all other matters, this appeal has proceeded  
25 from the beginning with the shared understanding that the subject of appeal is the board of  
26 commissioners' December 28, 2010 decision. Indeed, it was petitioner ORCA who noted

1 that the record was missing two pages from the commissioners' December 28, 2010 decision,  
2 and alerted the county, which subsequently filed a supplemental record to include the  
3 missing pages. Because respondents identify no prejudice to any parties' substantial rights  
4 from petitioner's error in mis-identifying the subject of its appeal, we view that error as a  
5 technical violation of our rules, and therefore not a basis to dismiss ORCA's appeal. OAR  
6 660-010-0005.

7 The motion to dismiss is denied.

8 Dated this 16th day of March, 2011.  
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16 Tod A. Bassham  
Board Member