

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

3
4 DAVID M. BRUCE, BEVERLY J. BRUCE,)
5 ELDEN DUCKWORTH and JESSIE)
6 DUCKWORTH,)
7)
8 Petitioners,)
9)
10 vs.)
11)
12 CITY OF HILLSBORO,)
13)
14 Respondent,)
15)
16 and)
17)
18 PACIFIC REALTY ASSOCIATES, L.P.,)
19)
20 Intervenor-Respondent.)

LUBA No. 96-153

FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Hillsboro.

24
25 David M. Bruce, Hillsboro, filed the petition for
26 review and argued on his own behalf.

27
28 Timothy J. Sercombe, Portland, filed a response brief
29 and argued on behalf of respondent. With him on the brief
30 was Preston Gates & Ellis.

31
32 Steven L. Pfeiffer and Michael C. Robinson, Portland,
33 filed a response brief on behalf of intervenor-respondent.
34 With them on the brief was Stoel Rives.

35
36 HANNA, Chief Referee; GUSTAFSON, Referee, participated
37 in the decision.

38
39 DISMISSED 02/06/97

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's adoption of Ordinance No.
4 4457, which enacted special policies for petitioners'
5 property, which was otherwise controlled by another
6 ordinance.¹

7 **STATUS OF INTERVENTION**

8 In the Bruce Order, over petitioners' objections, we
9 allowed Pacific Realty Associate's (intervenor's) motion to
10 intervene. After petitioners amended their notice of intent
11 to appeal to limit the appeal to one ordinance, petitioners
12 suggested that intervenor might wish to withdraw.
13 Intervenor had timely filed its response brief before the
14 amended notice of intent to appeal was filed. Although
15 intervenor did not appear at oral argument, it has not
16 withdrawn as a party.

17 **FACTS**

18 **A. The Local Proceeding**

19 Petitioners own properties in the Orenco neighborhood,
20 which is one of four areas in the city designated as Light
21 Rail Station Community Planning Areas (SCPAs). Planning for

¹Petitioners originally appealed four ordinances, Nos. 4454, 4455 4456 and 4457. In response to our order on the city's motion to dismiss, Bruce v. City of Hillsboro, (the Bruce Order) ___ Or LUBA ___ (LUBA No. 96-153, Order, November 21, 1996), petitioners withdrew their notice of intent to appeal Ordinance Nos. 4454, 4455 and 4456, and stated their intent to appeal only Ordinance No. 4457.

1 the SCPAs, including proposed densities, was the subject of
2 a two-year planning process. The planning commission
3 developed and recommended city council adoption of the
4 ordinances of general applicability, Nos. 4454 and 4455.
5 Ordinance Nos. 4454 and 4455 establish densities for two
6 zones, the Station Community Residential - Orenco Township
7 Conservation District (SCR-OTC) zone, allowing a maximum of
8 12 single-family dwellings per acre, and the Station
9 Community Residential - Medium Density zone allowing between
10 12 and 45 units per acre. Petitioners' property is zoned
11 SCR-OTC.

12 Petitioners argued for increased density for their
13 properties before the planning commission. In response to
14 petitioners' requests, the planning commission developed and
15 recommended adoption of the special ordinances, Nos. 4456
16 and 4457. Ordinance Nos. 4456 and 4457 specifically pertain
17 to petitioners' properties, and grant a density increase to
18 petitioners' properties to allow a maximum density of 14
19 units per acre.² Record 25. Ordinance No. 4457 also
20 includes special provisions to allow townhouses and
21 rowhouses, and makes other siting and architectural
22 adjustments to assure that petitioners are able to achieve

²Ordinance 4454 amends the comprehensive plan generally to allow for SCPAs. Ordinance 4455 amends the zoning ordinance generally to allow for SCPAs. Ordinance 4456 amends the comprehensive plan specifically as it applies to petitioners' properties. Ordinance 4457 amends the zoning ordinance specifically as it applies to petitioners' properties.

1 the maximum allowed density.

2 Petitioners nonetheless continued to argue for further
3 increased density, and appealed the planning commission
4 decision to the city council, which adopted the planning
5 commission's recommendations. The city council adopted the
6 two ordinances of general applicability and the two special
7 ordinances.

8 **B. On Appeal to LUBA**

9 On August 26, 1996, petitioners appealed the adoption
10 of all four ordinances to LUBA. On September 12, 1996, the
11 county filed a motion requesting that the Board extend the
12 time for the county to submit the record, stating:

13 "The record for the broad legislation is quite
14 extensive. The ordinance itself is nearly 150
15 pages in length, exclusive of findings. It was
16 adopted following ten public hearings and
17 workshops before the Hillsboro Planning commission
18 and 94 other community meetings and workshops. It
19 will take a considerable period of time to collate
20 and organize the record of this legislation.
21 Respondent is seeking to negotiate a stipulation
22 with Petitioners to shorten the record." Motion
23 for Extension of Time to File Record.

24 The Board granted the city's motion on the day it was
25 received. Petitioners then filed a motion objecting to the
26 extension, stating, "[t]he argument presented by Respondent
27 is of no substance in that lack of time to prepare the
28 record is a false statement[,]" and requested that the Board
29 rescind its order extending the time to file the record, and

1 deny the extension.³ Motion To Rescind Order 1.

2 On October 1, 1996, the county filed a motion to
3 dismiss, both because petitioners' single appeal challenged
4 more than one decision and because petitioners had not
5 served notice of its appeal on parties other than the city.
6 We denied that motion, stating:

7 "In one notice of intent to appeal, petitioners
8 challenge four ordinances adopted by the city on
9 August 6, [1996], entitled Ordinances Nos. 4454,
10 4455, 4456 and 4457. The city filed a motion to
11 dismiss, contending that petitioners are
12 attempting to appeal four separate land use
13 decisions. The city contends that LUBA should
14 dismiss petitioners' appeal, or in the
15 alternative, should require petitioners to submit
16 three additional filing fees and deposits for
17 costs." (Footnote omitted.)

18 "* * * * *

19 "Petitioners served the city with notice but did
20 not serve other interested and essential parties,
21 as required by OAR 661-10-015(2). Petitioners'
22 failure to serve a timely notice of intent to
23 appeal on other interested and essential parties,
24 as required by OAR 661-10-015(2), would warrant
25 dismissal of this appeal if one of those parties
26 showed prejudice to its substantial rights. * * *
27 However, it is not for the city to show prejudice
28 to the substantial rights of those other
29 parties.^[3]

30 "* * * * *

³Despite the fact that on October 14, 1996 the county filed the entire record for the adoption of all four ordinances with LUBA, at oral argument on January 28, 1997, petitioner continued to argue its motion to rescind our order extending the time to file the record. To the extent petitioners' motion to rescind our order of extending the time to file the record cannot be construed as moot, it is denied.

1 "The city's motion to dismiss is denied. However,
2 in order to continue all four appeals, petitioner
3 must submit filing fees and costs for three
4 additional appeals within ten days of the date of
5 this order, and meet the requirements of
6 OAR 661-10-015(2)." (Citations omitted.) The
7 Bruce Order, slip op 1-4.⁴

8

9 _____
10 ³Petitioners may avoid a claim of prejudice to the substantial
11 rights of those other parties by serving the required notice as
soon as possible.

12 On December 4, 1996, petitioners withdrew their notice
13 of intent to appeal Ordinances Nos. 4454, 4455 and 4456, and
14 stated their intent to appeal only Ordinance No. 4457.
15 Petitioners also submitted a request to depose the city.
16 Additionally, petitioners submitted a Response to this
17 Board's Order, stating:

18 "When we are in receipt of proof that the
19 'parties' truly did request notification and the
20 City provides us with a legible corrected mailing
21 list and when the Board replies to our question,
22 we will, if the Board still so directs, notify the
23 interested parties."⁵ Petitioners' Response to

⁴Attached to the county's motion to dismiss was (1) a legible list of parties who were sent notice of the local decision; and (2) a certificate of service certifying that the motion to dismiss and the list of parties who were sent notice of the local decision was served on lead petitioner Bruce on October 3, 1996.

⁵In their request to depose, petitioners dispute the need to provide the required notice, stating:

"Petitioners challenge the legal necessity or right of Respondent to have notified those parties named on the list. * * * Petitioners allege that very very few, if any, of the parties on the list could prove that they 'appeared', before the local government * * *." Petitioners' Deposition Questions 1-2.

1 Boards Order 3.

2 **DISCUSSION**

3 The threshold question is whether LUBA has jurisdiction
4 to consider this appeal. It is well established that the
5 21-day deadline for filing a Notice of Intent to appeal is
6 jurisdictional. Ray v. Douglas County, 140 Or App 24, 27-
7 28, 914 P2d 26 (1996); Winner v. Multnomah County, 30 Or
8 LUBA 420, 423 (1996). In addition, service of copies of the
9 notice required under OAR 661-10-015(2) is also
10 jurisdictional.⁶ Bright v. City of Yachats, 16 Or LUBA 161,

Petitioners do not identify which city official they wish to depose.

⁶OAR 661-10-015 states, in relevant part:

"* * * * *

"(2) 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 as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed.

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

"* * * * *

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

"* * * * *

"(D) Any other person to whom written notice of the land use decision or limited land use decision was mailed as shown on the governing body's records. The telephone number may be omitted for any such person.

"* * * * *" (Emphasis added.)

1 164 (1987). See also Broetje-McLaughlin v. Clackamas
2 County, 21 Or LUBA 606 (1991). However, the 21-day deadline
3 for service of the notice is not jurisdictional, and late
4 service of the notice will not result in dismissal, absent
5 substantial prejudice to the parties."⁷ OAR 661-10-015(2)
6 and (3) unequivocally require that notice of an intent to
7 appeal be served on "any other person to whom written notice
8 of the land use decision was mailed."

9 Because petitioner appealed four ordinances, at least
10 two of which were of broad applicability, the list of
11 persons to whom notice was sent may have been lengthy. The
12 length of the notice list, however, is irrelevant to
13 petitioners' obligation to comply with the service of notice
14 requirements. The Board attempted to accommodate
15 petitioners by allowing them to amend their notice of intent
16 to appeal and correct their service of notice deficiencies
17 after the appeal process was well advanced. Petitioners did
18 not comply with that order and, thus, persons entitled to
19 notice of the appeal of Ordinance 4457 never received the
20 notice to which they were entitled. Instead, petitioners
21 employed tactics designed to improperly shift to the city

⁷A technical defect in a notice of intent to appeal provides no basis for dismissing the appeal, where the defect causes no prejudice to any party's substantial rights. See Tice v. Josephine County, 21 Or LUBA 550 (1991). "The 'substantial rights of parties' referred to in OAR 661-10-005 are those identified elsewhere in that rule as the 'speediest practicable review' and reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing[.]'" Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093 (1988).

1 the burden for service of notice.

2 Petitioners cannot unilaterally impose conditions on
3 their compliance with LUBA's rules.⁸ Petitioners' failure
4 to provide notice as required by OAR 661-10-015(2) defeats
5 our jurisdiction to consider this case.

6 This appeal is dismissed.

⁸In their response to the motion to dismiss and in telephone calls to LUBA staff, petitioners made clear their objection to complying with LUBA's rules.