

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JAMES FORD and LINDA FORD,
5 *Petitioners,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11
12 and

13
14 COPELAND SAND & GRAVEL, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2005-101

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Jackson County.

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24 Christian E. Hearn, Ashland, represented petitioners.

25
26 Steven R. Rinkle, Senior Assistant County Counsel, Medford, represented respondent.

27
28 Daniel O'Connor, Medford, represented intervenor-respondent.

29
30 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
31 participated in the decision.

32
33 DISMISSED

10/11/2005

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the county’s approval of a floodplain development permit in connection with an aggregate mining application.

FACTS

On July 1, 2005, this Board received a notice of intent to appeal (NITA) dated June 17, 2005. Accompanying that NITA was an affidavit dated June 29, 2005, attesting to certain facts regarding the date of filing of that NITA. The affidavit attached to the NITA alleges the following relevant facts:

On June 17, 2005 the affiant, a legal assistant employed by the attorneys for petitioners, “carried a sealed envelope to the United States Post Office in Ashland, Oregon,” containing the following documents: (1) a cover letter addressed to the Land Use Board of Appeals dated June 17, 2005, (2) the original and two copies of a notice of intent to appeal, and (3) a check in the amount of \$325 made out to the Land Use Board of Appeals. Affidavit 2. On June 17, 2005, that envelope was mailed via certified mail – return receipt requested. *Id.* A few days later, the affiant received the return receipt, indicating delivery and receipt of the envelope. *Id.* at 3. On or about June 28, 2005, petitioners’ attorneys’ office received notice that the NITA and filing fee had been delivered to a third party and not to LUBA. *Id.* The affidavit does not indicate the reason the envelope containing the NITA and filing fee was delivered to the third party or who signed the certified mail return receipt. On June 29, 2005, petitioner re-filed the NITA by mailing it by certified mail, to LUBA. LUBA received the NITA and filing fee for the first time on July 1, 2005.

As relevant, our rules provide:

“(1) Filing of [NITA]:

“(a) The [NITA], together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final or within the time provided by

1 ORS 197.830(3) through (5). * * * A [NITA] filed thereafter shall
2 not be deemed timely filed, and the appeal shall be dismissed.

3 “(b) The date of filing a [NITA] is the date the [NITA] is received by
4 the Board, or the date the [NITA] is mailed, provided it is mailed
5 by registered or certified mail and the party filing the [NITA] has
6 proof from the post office of such mailing date. If the date of mailing
7 is relied upon as the date of filing, acceptable proof from the post
8 office shall consist of a receipt stamped by the United States Postal
9 Service showing the date mailed and the certified or registered
10 number. * * *.” OAR 661-010-0015(1).

11 In this case, petitioners rely on the date of the first mailing, June 17, 2005, as the date of filing the
12 NITA, pursuant to OAR 661-010-0015(1)(b).

13 **MOTION TO DISMISS**

14 On July 12, 2005, the county filed a motion to dismiss based on petitioners’ failure to file a
15 timely NITA. The county alleges that the challenged decision was mailed to petitioners on June 1,
16 2005, and that petitioners filed their NITA by certified mail on June 29, 2005.¹ Because the NITA
17 was filed more than 21 days after the challenged decision became final, the county argues, the
18 appeal must be dismissed. The county’s motion does not address the facts alleged in the affidavit
19 regarding the June 17, 2005 mailing in any way.²

20 On July 27, 2005, petitioners filed a response to the county’s motion to dismiss. Petitioners
21 allege that “[o]n June 17, 2005, [they] filed and served their Notice of Intent to Appeal in
22 compliance with OAR 661-010-0015(1)(a).” Response to Motion to Dismiss 2. They allege that
23 the NITA was mailed by certified mail, return receipt requested, that the date of mailing of the
24 NITA was within 21 days of the issuance of the challenged decision, and that the affidavit attached
25 to the NITA includes as an exhibit “a receipt stamped by the United States Postal Service showing
26 the date mailed and the certified or registered number,” as required by OAR 661-010-0015(1)(b).

¹ Both parties appear to agree that the challenged decision became final on the date it was mailed.

² That omission by the county is apparently a result of petitioners’ failure to serve the affidavit on the county until July 26, 2005, two weeks after the county filed the motion to dismiss.

1 Petitioners allege that the requirements of OAR 661-010-0015(1)(b) are satisfied and that the June
2 17, 2005 NITA was timely filed. Petitioners therefore request that the county's motion to dismiss
3 be denied.

4 If those were the only relevant facts, we would likely deny the motion to dismiss.
5 However, on July 29, 2005, Copeland Sand & Gravel, Inc. (Copeland), the applicant, filed a
6 Motion to Intervene on the side of the county. In that motion, and in its reply to petitioners'
7 response to that motion, Copeland alleges facts concerning the filing.³

8 "As was originally explained to the undersigned, the legal assistant mistakenly
9 placed the Notice of Appeal documents in an envelope addressed to a client/third-
10 party and the documents intended to the client/third-party were placed in the
11 envelope addressed to LUBA. LUBA, thus, received the documents intended to
12 the client/third-party and then contacted Petitioners' attorney concerning the
13 mistake. Consequently, the client/third-party received the Notice of Appeal
14 documents which were returned to Petitioners." Reply to Petitioners' Response to
15 Motion to Intervene 2.

16 Based on facts alleged by Copeland and petitioners, we understand the following facts to be
17 undisputed. The envelope containing the NITA and filing fee was addressed to and delivered by the
18 United States Post Office to a third party. The documents intended to be delivered to that third
19 party were inadvertently placed into a different envelope that was addressed to LUBA. Although
20 the NITA and filing fee were mailed certified mail on June 17, 2005, as petitioners allege, they were
21 mailed certified mail to the third party, not to LUBA.

22 Petitioners' argument that their NITA was timely filed on June 17, 2005 depends on a
23 narrow, literal reading of OAR 660-010-0015(1)(b), quoted above. It is true that OAR 660-010-
24 0015(1)(b) does not expressly state that the NITA must be placed in an envelope that is addressed
25 to LUBA. However, OAR 660-010-0015(1)(a) clarifies any ambiguity in subsection (b) of that

³ LUBA's review is limited to the record. ORS 197.835(2)(a). However, we have consistently allowed the introduction of evidence regarding jurisdiction without filing a motion to take evidence where no party objects. *Mazeski v. Wasco County*, 31 Or LUBA 126, 128 (1996). Petitioners object to the motion to intervene in general, but do not specifically object to Copeland's attempt to introduce evidence outside the record, nor do they respond to the factual allegations provided by Copeland.

1 rule; subsection (a) requires that the NITA “be filed *with the Board* on or before the 21st day after
2 the date the decision sought to be reviewed becomes final * * *.” (Emphasis added). We believe it
3 is beyond dispute that our rules contemplate that the envelope that contains the NITA and that is
4 mailed certified mail to LUBA must actually be addressed to LUBA. Accordingly, a NITA that is
5 placed in an envelope that is addressed to and mailed certified mail to an address that is not
6 LUBA’s is not “filed” with LUBA.

7 Failure to comply with the deadline for filing a NITA is not a mere technical violation. OAR
8 661-010-0005 ([f]ailure to comply with the time limit for filing a notice of intent to appeal * * * is
9 not a technical violation”). As we have stated on numerous occasions, we strictly adhere to the
10 deadlines for filing NITAs and petitions for review. *See Bauer v. City of Portland*, 37 Or LUBA
11 489, 491 (2000) (failure to timely file petition for review and failure to obtain intervenor’s consent to
12 extension); *Oak Lodge Water District v. Clackamas County*, 18 Or LUBA 643, 644 (1990)
13 (untimely notice of intent to appeal); *Beckwith v. City of Portland*, 16 Or LUBA 792, 794 (1988)
14 (citing cases dismissing appeals for failure to comply with these deadlines). Petitioners did not mail,
15 by registered or certified mail, an envelope addressed to LUBA containing the NITA and filing fee
16 until June 29, 2005, and LUBA did not receive the NITA until July 1, 2005. Accordingly, the
17 NITA was filed, for purposes of OAR 660-010-0015(1)(b), on June 29, 2005, more than 21 days
18 after the challenged decision became final and, therefore, that filing was not timely.

19 The county’s motion to dismiss is granted.

20 **MOTION TO INTERVENE**

21 As relevant, ORS 197.830(7) provides:

22 “(a) Within 21 days after a notice of intent to appeal has been filed with the
23 board * * *, any person may intervene in and be made a party to the
24 review proceeding * * *.

25 “* * * * *

26 “(c) Failure to comply with the deadline set forth in [ORS 197.830(7)(a)] shall
27 result in denial of a motion to intervene.”

1 As mentioned above, Copeland filed its motion to intervene on July 29, 2005. Petitioners argue
2 that the motion must be denied because it was not filed within 21 days of the date the NITA was
3 filed.⁴ OAR 661-010-0050(2).⁵ Copeland counters that petitioners failed to serve them a copy of
4 the affidavit attached to the NITA that was mailed on June 29, 2005 and that it “did not believe
5 there was a need to intervene in the case in light of the County’s Motion to Dismiss.” Reply to
6 Petitioners’ Response to Motion to Intervene 5.

7 The relevant question here is whether either (1) petitioners’ service of the initial June 17,
8 2005 NITA or (2) the June 29, 2005 filing, was sufficient to trigger the 21-day deadline for filing the
9 motion to intervene. For the following reasons, we hold that neither event was sufficient. As
10 explained above, the June 17, 2005 NITA did not comply with our rules for filing the NITA.
11 Accordingly, the June 17, 2005 mailing was not sufficient to perfect the appeal. Although the NITA
12 was *served* on the county and Copeland on June 17, 2005, the NITA was not *filed* until June 29,
13 2005, when petitioners correctly mailed the NITA to LUBA (June 29, 2005 NITA). However,
14 petitioners apparently did not serve that NITA, which included the affidavit, on the county until July
15 26, 2005. The June 29, 2005 NITA apparently was never served on Copeland.

16 OAR 660-010-0015(3)(i) requires that copies of the NITA be served on “all persons
17 required to be named in the [n]otice.” OAR 660-010-0015(3)(f)(C) requires that the applicant or
18 the applicant’s attorney be named in the NITA. As far as we can tell, Copeland was not served the
19 June 29, 2005 NITA and did not become aware of the re-filed NITA until July 26, 2005 at the
20 earliest, when the county was served a copy of the June 29, 2005 NITA. Petitioners’ failure to
21 serve the June 29, 2005 NITA on Copeland prejudiced Copeland’s substantial rights and

⁴ Although petitioners rely on June 17, 2005 as the date of filing, Copeland’s motion to intervene was also filed more than 21 days after the actual filing date, June 29, 2005.

⁵ OAR 660-010-0050(2) provides, in relevant part:

“A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-010-0015 * * *.”

1 precluded it from filing a timely motion to intervene. Accordingly, Copeland's failure to file its
2 motion to intervene within 21 days of the date the NITA was filed does not require denial of its
3 motion. *See Mountain West Investment v. City of Silverton*, 38 Or LUBA 932, 933-34 (2000)
4 (failure to file a motion to intervene within the 21-day period prescribed by ORS 197.830(7) does
5 not require that intervention be denied where the petitioner did not serve the notice of intent to
6 appeal on intervenor until 53 days after the notice was filed with LUBA); *compare Bowlin v.*
7 *Grant County*, 35 Or LUBA 776, 779-80 (1998) (petitioner's failure to serve a copy of the notice
8 of intent to appeal on the applicant does not toll the 21-day period to intervene under ORS
9 197.830(6), where the applicant nonetheless received a copy of the notice and did not file a motion
10 to intervene within 21 days of receiving the notice).

11 Copeland's motion to intervene is granted.

12 This appeal is dismissed.