

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

03/14/18 #31456 LUBA

3  
4                                   RANDY COSSINS, ADAM AGATHAKIS,  
5                                   MATTHEW AGATHAKIS, AMANDA METZLER,  
6                                   TAMARA DEAN, JILLIAN WAGNER,  
7                                   JUDITH SCHARNS, JOSH EVANS,  
8                                   STEVEN FIELDS, TONY RUSSO,  
9                                   MARK SELIGMAN, AMBER GUIENT,  
10                                  YUSEF GUIENT, DEL SHERIDAN,  
11                                  MICHAEL SHANNON, CEDAR GREY,  
12                                  ROBERT SWEARINGEN and KEVIN McCABE,  
13   *Petitioners,*

14  
15   vs.

16  
17   JOSEPHINE COUNTY,  
18   *Respondent.*

19  
20   LUBA No. 2017-122

21  
22   FINAL OPINION  
23   AND ORDER

24  
25                                   Appeal from Josephine County.

26  
27                                   Ross Day, Portland, filed the petition for review and argued on behalf of  
28 petitioners. With him on the brief was Day Law & Associates, P.C.

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30                                   M. Wally Hicks, County Counsel and Augustus Ogu, Certified Law  
31 Student, Grants Pass, filed the response brief and argued on behalf of  
32 respondent.

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34                                   RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN Board  
35 Member, participated in the decision.

36  
37                                   REMANDED                                   03/14/2018

38  
39                                   You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county ordinance, Ordinance 2017-002, adopting amendments to the county's rural land development code.

**JURISDICTION**

On December 7, 2017, petitioners filed a Notice of Intent to Appeal (Original NITA) Ordinance 2017-002 (the Ordinance). The Original NITA lists the names of 20 persons in the caption.<sup>1</sup> There is no dispute that the Original NITA was filed within the time limit set forth in ORS 197.830(9), which provides in relevant part that “[a] notice of intent to appeal a [post-acknowledgement plan or land use regulation amendment] shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. \* \* \*”<sup>2</sup>

On January 8, 2018, LUBA received an Amended Notice of Intent to Appeal (Amended NITA). The Amended NITA lists the names of 45 persons in its caption, 25 of whom were not listed in the Original NITA.

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<sup>1</sup> In their petition for review, petitioners requested that Matthew Turner and Rex Turner, in addition to four other persons who are first identified as petitioners in the Amended NITA, be dismissed from the appeal. Petition for Review 4.

<sup>2</sup> The challenged decision is a post-acknowledgement land use regulation amendment that is subject to the notice requirements at ORS 197.610 and ORS 197.615, because it amends a land use regulation, the Josephine County Rural Land Development Code.

1           The county argues that the 25 additional persons that are included in the  
2 caption of the Amended NITA failed to timely file their notice of intent to  
3 appeal because the Amended NITA was not filed within the time set in ORS  
4 197.830(9) and OAR 661-010-0015(1), and as a result those persons should not  
5 be allowed to participate as parties to the appeal.<sup>3</sup> In response, petitioners argue  
6 that the Amended NITA was filed to correct a mistake by petitioners' counsel,  
7 and that the petitioners' failure to file a NITA on behalf of all 25 additional  
8 persons within the 21-day deadline was a "technical violation" of LUBA's  
9 rules, which LUBA may overlook pursuant to OAR 661-010-0005 if the  
10 violation does not prejudice any party's substantial rights.<sup>4</sup>

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<sup>3</sup> OAR 661-010-0015(1), LUBA's rule that implements ORS 197.830(9), provides:

“(1) Filing of Notice:

“(a) The Notice, 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 ORS 197.830(3) - (5). A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.”

<sup>4</sup> OAR 661-010-0005 provides:

1           The county responds that amending a notice of intent to appeal after the  
2 deadline for filing a notice of intent to appeal has expired to add petitioners as  
3 parties that were mistakenly omitted from the Original NITA is not a “technical  
4 violation” of LUBA’s rules at OAR 660-010-0015.<sup>5</sup> We agree with the county.  
5 In ORS 197.830(9) and ORS 197.830(2), the legislature has specified the  
6 circumstances under which a person can appeal a decision to LUBA. First, in  
7 order to appeal a decision to LUBA, a petitioner must timely file a notice of  
8 intent to appeal. Second, a petitioner must establish that the petitioner  
9 “appeared” during the proceedings below. *See* ORS 197.830(2)(b); ORS  
10 197.620(2) (stating the appearance requirements for appealing a PAPA).

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“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.*” (Emphasis added.)

<sup>5</sup> The county also argues that one of the persons that is referred to in the petition for review as a petitioner, John Springer, does not appear in either the Original NITA or the Amended NITA, and therefore is not a party to the appeal. Petitioners do not respond to the county’s argument. We agree with the county.

1           The 25 additional petitioners listed in the Amended NITA have not  
2 established that their notice of intent to appeal was filed within the time limit  
3 set forth in ORS 197.830(9). OAR 661-010-0005 provides that “[f]ailure to  
4 comply with the time limit for filing a notice of intent to appeal under OAR  
5 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a  
6 technical violation.” We conclude that the 25 additional persons included in the  
7 Amended NITA are not parties to this appeal.

8           **REPLY BRIEF**

9           Petitioners move for permission to file a reply brief to respond to the  
10 challenge to the Amended NITA that is raised in the response brief. The reply  
11 brief is allowed.

12           **FACTS**

13           A brief explanation of the state’s laws regulating the growing,  
14 processing, and sale of marijuana is necessary before we turn to the merits of  
15 this appeal. In 1998, Oregon voters approved the Oregon Medical Marijuana  
16 Act (OMMA), which allowed the production and use of medical marijuana.  
17 The OMMA is now codified at ORS 475B.785 to 475B.949. In November  
18 2014, Oregon voters approved Ballot Measure 91, which legalized recreational  
19 (non-medical) marijuana under state law. Measure 91 placed administrative  
20 authority over the state’s recreational marijuana program with the Oregon  
21 Liquor Control Commission (OLCC). After the passage of Measure 91, in  
22 2015, 2016, and 2017, the legislature enacted changes to the OMMA and the

1 state’s recreational marijuana program. Measure 91, the OMMA, and the 2015,  
2 2016, and 2017 changes are now codified at ORS 475B.005 *et seq.*<sup>6</sup>

3 ORS 475B.486 and ORS 475B.928 allow local governments to adopt  
4 “reasonable regulations” on the operation of marijuana businesses for  
5 recreational purposes and on the operations of grow sites for medical  
6 purposes.<sup>7</sup> On August 28, 2017, the county planning commission held a hearing  
7 to consider whether to recommend to the board of county commissioners that  
8 the county adopt text amendments to the Josephine County Rural Land  
9 Development Code (RLDC) Section 61.050 to limit marijuana uses in the  
10 county’s Rural Residential (RR-5) zone. The August 28, 2017 planning  
11 commission hearing was continued to August 31, 2017, and at the conclusion  
12 of the August 31, 2017 planning commission hearing, the planning commission  
13 voted to recommend the text amendments to the board of county  
14 commissioners. Record 591-94.

15 The board of county commissioners then held hearings on September 20,  
16 2017, November 1, 2017, and November 29, 2017. The record was closed to  
17 public testimony at the conclusion of the November 29, 2017 hearing. Record

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<sup>6</sup> Although Oregon law now allows growing, processing, and sale of marijuana, the Federal Controlled Substances Act, 21 USC § 801 *et seq.*, prohibits the manufacture, distribution, dispensation, and possession of marijuana.

<sup>7</sup> The phrase “reasonable regulations” is defined in ORS 475B.486(1)(a) - (g) (recreational) and ORS 475B.928(1)(a) - (d) (medical) for purposes of each subsection. The definitions are not relevant to our disposition of this appeal.

1 9. On December 6, 2017, the board of county commissioners voted to adopt the  
2 Ordinance and the text amendments to the RLDC.

3 As relevant here, the Ordinance adopts new definitions relating to  
4 marijuana and adds a new Subsection E to RLDC 61.050, a section that sets out  
5 criteria for farm uses in the RR-5 zone. New Subsection E provides:

6 “E. The production of commercial marijuana shall be prohibited  
7 on a lot or parcel five acres or less in size. On a parcel  
8 greater than five acres, the size of the marijuana grow shall  
9 not exceed a Micro-tier I or Micro-tier II. Mixed production  
10 is allowed per OLCC size regulations for Micro-tiers.  
11 Lawful marijuana grows on lots greater than five acres shall  
12 have two years from the date of this amendment to bring  
13 their marijuana grow into compliance with this section of  
14 the code (Section 61.050).” Record 3.

15 This appeal followed.

16 **SECOND ASSIGNMENT OF ERROR**

17 In their second assignment of error, petitioners argue that the county  
18 committed a procedural error that prejudiced their substantial rights in failing  
19 to provide them with the advance, individual, written notice by mail that is  
20 required by Ballot Measure 56, codified at ORS 215.503. ORS  
21 197.835(9)(a)(B).<sup>8</sup> Measure 56 was adopted by the legislature during the 1997  
22 legislative session, and was referred by the legislature to the voters for approval

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<sup>8</sup> ORS 197.835(9)(a)(B) requires LUBA to reverse or remand a land use decision if the local government “[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner.”



1 in the November 3, 1998 statewide general election. It was approved. Measure  
2 56 was intended to increase citizen participation in the decision making process  
3 by providing advance, individual, written notice of proposed changes in local  
4 land use law to property owners affected by the changes before changes to  
5 allowed land uses under those laws can take effect. Official Voters' Pamphlet,  
6 General Election, November 3, 1998, 15.

7 ORS 215.503 requires that the county provide to certain property owners  
8 advance, individual, written notice by mail of the first hearing on an ordinance  
9 that proposes to rezone their property.<sup>9</sup> ORS 215.503 provides, in relevant part:

10 “(4) In addition to the notice required by ORS 215.223(1), at  
11 least 20 days but not more than 40 days before the date of  
12 the first hearing on an ordinance that proposes to rezone  
13 property, the governing body of a county shall cause a  
14 written individual notice of land use change to be mailed to  
15 the owner of each lot or parcel of property that the  
16 ordinance proposes to rezone.

17 “\* \* \* \* \*

18 “(9) For purposes of this section, property is rezoned when the  
19 governing body of the county:

20 “(a) Changes the base zoning classification of the  
21 property; or

22 “(b) Adopts or amends an ordinance in a manner that  
23 limits or prohibits land uses previously allowed in the  
24 affected zone.”

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<sup>9</sup> ORS 215.503(7) allows the notice required under the statute to be  
“included with the tax statement required under ORS 311.250.”

1 According to petitioners, “property is rezoned” by the Ordinance, within the  
2 meaning of ORS 215.503(9)(b), because the Ordinance amends the RLDC and  
3 limits the size of, or in some cases prohibits entirely, a use - growing of  
4 cannabis - that was previously allowed in the RR-5 zone. Although the county  
5 does not concede that Measure 56 notice is required, we agree with petitioners  
6 that the Ordinance clearly “limits” and “prohibits” the growing of cannabis in  
7 the RR-5 zone in certain specified circumstances, and therefore “rezoned”  
8 property, within the meaning of ORS 215.503(9).

9 Petitioners argue that the county failed to provide the notice that is  
10 required by ORS 215.503. ORS 215.503(5) contains mandatory language, and  
11 is specific regarding what is required to be included in the notice of a land use  
12 change:

13 “(5) *An additional individual notice of land use change required*  
14 *by subsection (3) or (4) of this section shall be approved by*  
15 *the governing body of the county and shall describe in detail*  
16 *how the proposed ordinance would affect the use of the*  
17 *property. The notice shall:*

18 “(a) *Contain substantially the following language in*  
19 *boldfaced type across the top of the face page*  
20 *extending from the left margin to the right margin:*

21 “This is to notify you that (governing body of the  
22 county) has proposed a land use regulation that may  
23 affect the permissible uses of your property and other  
24 properties.

25 “(b) *Contain substantially the following language in the*  
26 *body of the notice:*

1 “On (*date of public hearing*), (governing body) will  
2 hold a public hearing regarding the adoption of  
3 *Ordinance Number* \_\_\_\_\_. The (governing body) has  
4 determined that adoption of this ordinance may affect  
5 the permissible uses of your property, and other  
6 properties in the affected zone, and may change the  
7 value of your property.

8 “*Ordinance Number* \_\_\_\_\_ is available for inspection  
9 at the \_\_\_\_\_ County Courthouse located  
10 at \_\_\_\_\_. A copy of Ordinance Number \_\_\_\_\_  
11 also is available for purchase at a cost of \_\_\_\_\_.

12 “For additional information concerning Ordinance  
13 Number \_\_\_\_\_, you may call the (governing body)  
14 Planning Department at \_\_\_\_\_.” (Emphases  
15 added.)

16 In its response brief, and in a supplemental memorandum that we treat as  
17 an allowed amendment to the response brief, the county points to Record 852-  
18 53 as evidence that the county complied with its obligations under ORS  
19 215.503. Record 852 is a letter or notice dated August 16, 2017 that is  
20 addressed “Attn: LUCS [Land Use Compatibility Statement] Applicants[.]”<sup>10</sup>  
21 Record 853 is a Certificate of Mailing in which the county planning director  
22 certifies that the August 16, 2017 letter/notice was provided to a certain class  
23 of applicants for a LUCS “by sending a copy of the Notice to 348 addresses, by

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<sup>10</sup> ORS 475B.063 requires the OLCC to request a Land Use Compatibility Statement (LUCS) from the county that demonstrates that the use is allowed on the applicant’s property, prior to the OLCC issuing a license to an applicant to produce, process or sell marijuana. ORS 475B.074 lists exemptions from the requirement to obtain a LUCS.

1 first class mail, with postage prepaid, on August 16, 2017.” Record 853.  
2 According to the county, that August 16, 2017 letter or notice was sufficient to  
3 comply with the county’s obligations under ORS 215.503.<sup>11</sup>

4 At oral argument, petitioners responded by arguing that the August 16,  
5 2017 letter at Record 852 is insufficient to comply with ORS 215.503 in  
6 several respects. First, petitioners argued that the letter at Record 852 does not  
7 identify the date of the first hearing, or in fact reference a hearing regarding the  
8 Ordinance to be held at all, as ORS 215.503(5)(b) requires. Second, petitioners  
9 responded that the letter at Record 852 does not reference any proposed  
10 ordinance or identify any ordinance by number, as ORS 215.503(5)(b) requires.  
11 Third, petitioners responded that the letter at Record 852 was not sent during  
12 the time frame specified in ORS 215.503(4) – “at least 20 days but not more  
13 than 40 days before the date of the first hearing on an ordinance that proposes  
14 to rezone property[.]” Petitioners pointed out that the first planning commission  
15 hearing on the proposed text amendments was held on August 28, 2017, only  
16 twelve days after the date of the August 16, 2017 letter, rather than 20 days  
17 before that planning commission hearing.

18 We agree with petitioners that the county failed to comply with the  
19 requirements in ORS 215.503. The letter at Record 852 is clearly insufficient to  
20 comply with the notice requirements of ORS 215.503(5). The letter at Record

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<sup>11</sup> At oral argument, we understood the county to take the position that there are approximately 16,000 properties in the county zoned RR-5.

1 852 does not refer to any ordinance that the county governing body is  
2 considering adopting, or identify the date of any hearing that is scheduled to  
3 consider any ordinances. The letter is insufficient to notify any recipient that  
4 the county “*has proposed* a land use regulation that may affect the permissible  
5 uses of your property and other properties,” in the words of ORS  
6 215.503(5)(a). (Emphasis added.) The letter only references a previously  
7 adopted July 2017 board of county commissioners’ *order* that directed the  
8 planning department to propose regulations for growing marijuana on rural  
9 residential lands. In addition, we agree with petitioners that even if the letter  
10 could be understood to serve as the county’s statutorily required notice under  
11 ORS 215.503(4), the county failed to send the letter within the time frame  
12 required by ORS 215.503(4): “at least 20 days but not more than 40 days  
13 before the date of the first hearing on [the] ordinance[.]”

14 The county’s procedural error warrants remand only if it “prejudiced the  
15 substantial rights of the petitioner[.]” ORS 197.835(9)(a)(B); *Homebuilders*  
16 *Association v. City of Portland*, 37 Or LUBA 707, 714-15 (2000). Petitioners’  
17 substantial rights that are protected by ORS 197.835(9)(a)(B) include “an  
18 adequate opportunity to prepare and submit their case and a full and fair  
19 hearing.” *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). The county  
20 argues that all of the petitioners named in the Original NITA participated in  
21 one or more of the hearings held below, and thus the county’s failure to provide

1 petitioners with the notice required by ORS 215.503 did not prejudice any  
2 petitioners' substantial rights.

3         Petitioners argue that the substantial rights of all the petitioners to  
4 meaningfully participate in the proceedings before the county were prejudiced  
5 by the county's failure to provide the individualized notice required under ORS  
6 215.503. In particular, petitioners argue that petitioners Metzler, Wagner, and  
7 Sheridan only participated at the last hearing before the board of county  
8 commissioners on November 29, 2017, by submitting written comments prior  
9 to the record closing. Petition for Review 20. According to petitioners, such  
10 last-minute participation at the last of many hearings is not "an adequate  
11 opportunity to prepare and submit their case and a full and fair hearing."  
12 *Muller*, 16 Or LUBA at 775.

13         We agree with petitioners. As discussed above, the intent of Measure 56  
14 was to give property owners (1) advance, (2) individual, and (3) written notice  
15 that the governing body was considering changes in zoning that could affect  
16 the allowed uses on their particular properties. Petitioners Metzler, Wagner,  
17 and Sheridan each own RR-5-zoned property in the county, and thus were  
18 entitled to the advance, individual, written notice by mail that is required by  
19 ORS 215.503. Given the intent of the voters in approving Measure 56, we  
20 think that the fact that these three petitioners may have learned about the  
21 Ordinance through some other means, possibly including notice that did not  
22 include the information required by ORS 215.503, including the date of the

1 first hearing, and managed to learn enough about the proceedings to participate  
2 in the last hearing held before the board of commissioners just before the  
3 record closed, falls short of providing those petitioners with “an adequate  
4 opportunity to prepare and submit their case and a full and fair hearing.” 16 Or  
5 LUBA at 775. That is particularly so in circumstances where the local  
6 government entirely failed to provide the required ORS 215.503 notice to any  
7 person who is entitled to notice.<sup>12</sup>

8 In sum, we agree with petitioners that the county committed a procedural  
9 error that prejudiced their substantial rights in failing to provide the notice that  
10 is required under ORS 215.503(4) and (5). Remand is required in order for the  
11 county to provide the notice that is required by the statute.

12 The second assignment of error is sustained.

### 13 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

14 In their first assignment of error, petitioners argue that the Ordinance  
15 conflicts with ORS 215.130 and with various provisions of ORS 475B.005 *et*  
16 *seq.* In their third assignment of error, petitioners argue that the amendments to  
17 the RLDC are not “reasonable regulations” within the meaning of ORS

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<sup>12</sup> Petitioners and the county each submitted a Motion to Take Evidence Not in the Record. The motions concern whether some of the petitioners were among the 348 persons to whom the county maintains were mailed the letter that is at Record 852. Neither party objects to the other’s motion and the motions are allowed. However, our conclusion that the county failed to provide the notice that is required by ORS 215.503 makes it unnecessary to address the arguments in the motions to take evidence not in the record.

1 475B.486(1). *See* n 7. Because we sustain the second assignment of error,  
2 remand is required for the county to provide the advance, individual, written  
3 notice of hearing that is required by ORS 215.503, and to conduct at least one  
4 hearing pursuant to that notice. At the required hearing, the participants may  
5 well submit new evidence and argument, and the county’s ultimate decision  
6 following the hearing or hearings may well differ from the text amendments  
7 adopted in the Ordinance.<sup>13</sup> Accordingly, we do not reach the first and third  
8 assignments of error.

9 **DISPOSITION OF STAY**

10 In an order dated February 5, 2018, we granted petitioners’ motion to  
11 stay the Ordinance. *Cossins et al v. Josephine County*, \_\_ Or LUBA \_\_ (LUBA  
12 No. 2017-122, February 5, 2018, Order). With the issuance of this final opinion  
13 and order, the stay is dissolved.<sup>14</sup> *Meyer v. Jackson County*, 73 Or LUBA 1, 26  
14 (2016); *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335, 342  
15 (1995).

16 The county’s decision is remanded.

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<sup>13</sup> Although the issue is not before us, we doubt, in a legislative proceeding such as the one that led to the adoption of the Ordinance, that the county may limit notice and participatory rights to only those petitioners named in the Original NITA.

<sup>14</sup> The county moves for us to reconsider our order granting a stay. With the dissolution of the stay, we need not consider the county’s motion.