

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

3
4 MARK WENDT,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF KLAMATH FALLS,
10 *Respondent.*

11
12 LUBA No. 2020-026

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Klamath Falls.

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19 Michael L. Spencer, Klamath Falls, represented petitioner.

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21 Michael J. Swanson, Klamath Falls, represented respondent.

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23 RYAN, Board Member; RUDD, Board Chair, participated in the decision.

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25 ZAMUDIO, Board Member, did not participate in the decision.

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27 DISMISSED

03/18/2020

28
29 You are entitled to judicial review of this Order. Judicial review is
30 governed by the provisions of ORS 197.850.

Opinion by Ryan.

Petitioner appeals a city council decision on remand from *Sky Lakes Medical Center v. City of Klamath Falls*, ___ Or LUBA ___ (LUBA No 2019-019, May 24, 2019) approving design review and a conditional use permit for a three-story building.

On February 24, 2020, the Board received petitioner's notice of intent to appeal (Original NITA). The Original NITA did not comply with OAR 661-010-0015(2) because it did not reflect service either by mail or email on the applicant's representative identified in Paragraph IV of the Original NITA. In an order dated February 26, 2020, we ordered petitioner to file an amended notice of intent to appeal not later than March 4, 2020 that reflected service by mail on applicant's representative at the mailing address identified in Paragraph IV of the Original NITA, as required by OAR 661-010-0015(2).

On March 5, 2020, LUBA received an Amended Notice of Intent to Appeal (Amended NITA). Paragraph IV of the Amended NITA again identified the applicant's representative with the representative's mailing address, and added an additional person to Paragraph IV with that person's mailing address. Like the Original NITA, the Amended NITA included a certificate of service that stated that parties listed in Paragraph IV of the Amended NITA were served "by electronic mail." Amended NITA 3. The certificate of service therefore, again, failed to reflect proof of service on applicant's representatives, for whom no email addresses are listed in Paragraph IV, but for whom physical addresses are

1 listed. In addition, both the Original NITA and the Amended NITA listed an
2 incorrect address for the local governing body’s counsel.

3 In an order dated March 6, 2020, we ordered petitioner to file not later than
4 March 13, 2020 a second amended NITA that provides (i) the correct address for
5 the local governing body’s legal counsel, and proof of service of the second
6 amended NITA in person or by mail on the local governing body’s legal counsel
7 at the local governing body’s counsel’s correct address, and (ii) proof of service
8 of the second amended NITA to appeal on applicant’s representatives in person
9 or by mail at the mailing addresses listed in Paragraph IV of the Amended NITA,
10 as required by OAR 661-010-0015(2). In the order, we informed petitioner of the
11 correct address for the governing body’s legal counsel. We also explained that
12 OAR 661-010-0015(2) requires service of a notice of intent to appeal “in person
13 or by first class mail,” except that “where the local government provides only an
14 electronic mail address for a person identified in the Notice as required by
15 subsection (3)(f)(D), service shall be by electronic mail.” We notified petitioner
16 that if petitioner failed to file with LUBA a second amended NITA that provides
17 (i) the correct address for the local governing body’s counsel and proof of service
18 in person or by mail on the local governing body’s counsel at that correct address,
19 and (ii) proof of service in person or by mail on the applicant’s representatives
20 listed in Paragraph IV, the Board would dismiss the appeal. *Wendt v. City of*
21 *Klamath Falls*, ___ Or LUBA ___ (LUBA No. 2020-026, Order, Mar 6, 2020)
22 (slip op at 3).

1 On March 12, 2020, LUBA received a second amended NITA (Second
2 Amended NITA). The Second Amended NITA fails to comply with our March
3 6, 2020 order and more importantly, with LUBA’s rule at OAR 661-010-0015(2).
4 The Second Amended NITA continues to provide an incorrect address for the
5 local governing body’s legal counsel, and the certificate of service continues to
6 indicate that the Second Amended NITA was served on the local governing
7 body’s legal counsel by mail at that incorrect address, in contravention of our
8 March 6, 2020 order. The Second Amended NITA also continues to fail to
9 demonstrate that petitioner served the applicant’s representatives listed in
10 Paragraph IV *in person or by mail* as required by our March 6, 2020 order and
11 more importantly, by OAR 661-010-0015(2).

12 Petitioner has failed to serve all persons who were entitled to service of a
13 copy of the Original NITA, the Amended NITA, or the Second Amended NITA
14 under OAR 661-010-0015(2), and accordingly, LUBA is deprived of jurisdiction
15 over the appeal. *Bruce v. City of Hillsboro*, 32 Or LUBA 382, 387 (1997) (refusal
16 to serve copies of the notice of intent to appeal on persons entitled to service
17 under OAR 661-010-0015(2) deprives LUBA of jurisdiction over the appeal);
18 *Bright v. City of Yachats*, 16 Or LUBA 161, 164 (1987) (service of copies of the
19 notice required under OAR 661-010-0015(2) is jurisdictional).

20 Accordingly, the appeal is dismissed.