

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

PATRICK GREEN,
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

MARBLE SOLAR, LLC,
Intervenor-Respondent.

LUBA No. 2021-068

FINAL OPINION
AND ORDER

Appeal from Linn County.

Patrick Green represented themselves.

Kevan J. McCulloch represented respondent.

Damien R. Hall represented intervenor-respondent.

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

DISMISSED

11/09/2021

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

NATURE OF THE DECISION

Petitioner appeals a county board of commissioners approval of a conditional use permit (CUP) for a solar power generation facility.

FACTS

Intervenor applied for a CUP to establish a 12-acre commercial photovoltaic solar power generation facility. On June 22, 2021, the board of commissioners approved the CUP with conditions. On July 2, 2021, petitioner filed what turned out to be their first in a series of notices of intent to appeal (NITA 1) with LUBA.

The certificate of service for NITA 1 identifies “*June* _____, 2021,” as the date of service by mail. (Emphasis added.) The certificate of service did not comply with OAR 661-010-0075(2)(b)(D) because it did not include a statement of the date of deposit in the mail of service copies of NITA 1. On July 7, 2021, we issued an order requiring petitioner to, within seven days of the date of the order, (1) *file a corrected certificate of service that includes a statement, certified by petitioner, of the date of deposit in the mail of service copies of NITA 1* and (2) serve a copy of the corrected certificate of service on the county. Petitioner did not respond to this order.

On September 1, 2021, we issued a second order requiring petitioner to deliver to LUBA (1) a corrected certificate of service that *includes a statement, certified by petitioner, of the date of deposit in the mail of service copies of NITA*

1 1 and (2) proof of service of a copy of the corrected certificate of service on the
2 county. That order suspended the deadline for the county to transmit the record
3 until such time as we issued an order acknowledging receipt of a corrected
4 certificate of service.

5 On September 9, 2021, LUBA received another NITA (NITA 2) from
6 petitioner. NITA 2 did not correct the error identified in our July 7, 2021 and
7 September 1, 2021 orders because it did not complete the “June ___, 2021” space
8 in the original certificate of service or otherwise indicate when NITA 1 was
9 served on the required recipients set out in OAR 661-010-0015(3)(f). Petitioner’s
10 signature on the certificate of service for NITA 2 is dated “7-7-2021,” but there
11 is no indication that that is the date when NITA 1 was mailed to the required
12 recipients.

13 On September 10, 2021, we issued a third order directing petitioner to file
14 (1) another corrected NITA; (2) a corrected certificate of service that includes a
15 statement, certified by petitioner, of the date of deposit in the mail of service
16 copies of *NITA 1*; and (3) proof of service of copies of the corrected NITA and
17 the corrected certificate of service on the required recipients.

18 On September 17, 2021, we received a third NITA from petitioner (NITA
19 3). The certificate of service for NITA 3 certifies that, on “June ___, 2021,” NITA
20 3 was served on the required recipients. Petitioner’s signature on the certificate
21 of service is dated “9-16-2021,” but there is no indication that that is the date
22 when NITA 1 was mailed to the required recipients. In addition, as we explain in

1 more detail below, it is unclear whether the list of recipients that petitioner served
2 with NITA 3 included intervenor's counsel.¹ We nonetheless accepted the
3 corrected NITAs for purposes of initiating this appeal because petitioner certified
4 that all required recipients had been served with a NITA, even though we could
5 not determine the date of such service.

6 **MOTION TO DISMISS**

7 On October 15, 2021, intervenor filed a motion to dismiss the appeal based
8 on petitioner's failure to serve a copy of NITAs 1, 2, or 3 on intervenor.² It is well
9 established that service of the NITA on parties entitled to service as required
10 under ORS 197.830(9) and OAR 661-010-0015(2) is jurisdictional. *Bright v. City*
11 *of Yachats*, 16 Or LUBA 161, 164 (1987); *see also Broetje-McLaughlin v.*
12 *Clackamas County*, 21 Or LUBA 606, 609 (1991). LUBA will dismiss an appeal
13 if, after being provided by LUBA with the opportunity to serve all parties entitled
14 to NITA service, petitioners continue to fail to serve all parties entitled to NITA
15 service. *Bruce v. City of Hillsboro*, 32 Or LUBA 382, 387 (1997).

¹ NITA 3 also did not provide the date that *NITA 1* was served on the required recipients, as required by our previous orders. Our September 10, 2021 order required petitioner to include in the corrected NITA a statement "advising all persons, other than the governing body, that in order to participate in the review proceeding, a person must file a motion to intervene pursuant to OAR 661-010-0050." OAR 661-010-0015(3)(g). NITA 3 contains this language.

² On October 19, 2021, intervenor filed an amended motion to dismiss this appeal correcting certain dates in the original motion.

1 As noted, the certificate of service for NITA 3 is dated “9-16-2021.” The
2 certificate of service certifies that, on an unspecified date, NITA 3 was served on
3 a list of recipients attached to the certificate, but the certificate does not clearly
4 state that it was served on intervenor’s counsel. Intervenor states that it has never
5 been served with a copy of any NITA in this appeal and that it learned of the
6 appeal on October 7, 2021, from the county.

7 Petitioner has not filed a response to the motion to dismiss, and the
8 deadline for filing such a response has passed. OAR 661-010-0065(2) (allowing
9 14 days to respond to a motion). Here, based on petitioner’s lack of response to
10 the motion to dismiss, the failure of the certificate of service for NITA 3 to clearly
11 state that intervenor’s attorney was served with a copy of the NITA, and
12 intervenor’s statement in the motion to dismiss that it has never been served with
13 a copy of NITAs 1, 2, or 3, we conclude that petitioner failed to serve intervenor
14 with a copy of any NITA in this appeal, even after being provided numerous
15 opportunities and sufficient time to do so. Service of the NITA is jurisdictional,
16 and failure to serve a copy of any NITA filed in this appeal on intervenor means
17 the appeal will be dismissed. *Bruce*, 32 Or LUBA at 386-87.

18 The appeal is dismissed.