

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

3
4 RONALD R. THOMPSON and
5 RACHEL ANN THOMPSON,
6 *Petitioners,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

14
15 ROBERT KIM REED and KAREN R. REED,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2021-082

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

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25 Ronald R. Thompson and Rachel Ann Thompson represented themselves.

26
27 D. Adam Smith represented respondent.

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29 Lisa Andrach represented intervenors-respondents.

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

33
34 DISMISSED

02/18/2022

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

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision declining to hear an appeal of a hearings officer decision approving a replacement dwelling in an exclusive farm use zone.

BACKGROUND

On August 23, 2021, LUBA received petitioners' original notice of intent to appeal (NITA). The original NITA did not comply with OAR 661-010-0015, in part, because it did not identify and show service of the NITA on the county's legal counsel. OAR 661-010-0015(2). On August 24, 2021, LUBA issued an order requiring petitioners to (1) file with LUBA an original and two copies of a corrected NITA that conforms with OAR 661-010-0015 and (2) contemporaneously serve copies of the corrected NITA upon all persons required to be named in the NITA. Our order also required that petitioners include with the corrected NITA proof of service of the corrected NITA upon all persons required to be named in the NITA. OAR 661-010-0015(3)(i).

On September 7, 2021, LUBA received petitioners' corrected NITA, which added the name and address of the county's legal counsel and included a certificate of service. However, that certificate is not dated and not certified (*e.g.*, signed) by the person who made such service, as required by OAR 661-010-

1 0075(2)(b)(D).¹ On September 8, 2021, LUBA issued an order directing
2 petitioners to file (1) a corrected certificate of service of the corrected NITA upon
3 all persons required to be named in the NITA, certified by the person who made
4 such service, and (2) proof of service of the corrected certificate of service upon
5 all persons required to be named in the NITA.

6 On September 16, 2021, LUBA received additional copies of the corrected
7 NITA with a corrected certificate of service that states that, on September 2,
8 2021, petitioner Rachel Ann Thompson served a copy of the corrected NITA by
9 first-class mail “on all persons listed in paragraphs III and IV” of the corrected
10 NITA. Paragraph III of the corrected NITA provides a name and address for
11 county counsel. The corrected certificate of service attached to the corrected
12 NITA is signed and dated September 14, 2021.

13 **MOTION TO DISMISS**

14 On September 22, 2021, the county filed a motion to dismiss this appeal
15 on the basis that petitioners had failed to serve county counsel with a copy of the
16 corrected NITA. The county attached to that motion a declaration of a paralegal
17 in county counsel’s office stating that the paralegal checks and logs incoming

¹ OAR 661-010-0075(2)(b)(D) provides:

“Documents filed with the Board shall contain either an acknowledgement of service by the person served or proof of service by a statement certified by the person who made service of the date of personal delivery or deposit in the mail, and the names and addresses of the persons served (see Exhibit 6).”

1 mail and that, as of September 22, 2021, the county had received a copy of the
2 original NITA filed in this appeal but had not received a copy of any corrected
3 NITA. LUBA received that motion on September 27, 2021. On that same day,
4 LUBA issued an order suspending this appeal.

5 On September 30, 2021, LUBA received petitioners' response to the
6 county's motion to dismiss. Petitioners assert that the statements made by county
7 counsel and the paralegal "are false" and that the county's "claims of not
8 receiving the corrected NITA are questionable." Response to Motion to Dismiss
9 1-2.

10 On January 24, 2022, we issued an order explaining that the parties'
11 pleadings create a factual dispute. Petitioners assert that they did serve a copy of
12 the corrected NITA on county counsel via first-class mail, although petitioners
13 do not clarify the date of such service. County counsel contends that they have
14 not received a service copy of the corrected NITA. We concluded that the most
15 efficient way for the Board to resolve that factual dispute was for petitioners to
16 serve (or re-serve) a copy of the corrected NITA on the county. We therefore
17 ordered petitioners to serve a copy of the corrected NITA on the county and file
18 with LUBA a certificate of service showing the date and manner of service no
19 later than February 7, 2022. The January 24, 2022 order explains that, "[i]f
20 petitioners do not file a certificate of service demonstrating service of the
21 corrected NITA on the county, then the Board will dismiss the appeal."

1 As of this date, LUBA has not received a certificate of service showing
2 that petitioners served (or re-served) the county with the corrected NITA in
3 accordance with our January 24, 2022 order. Accordingly, we conclude that
4 petitioners failed to serve the corrected NITA on the county, even after being
5 provided numerous opportunities and sufficient time to do so. LUBA will dismiss
6 an appeal if, after being provided by LUBA with the opportunity to serve all
7 parties entitled to NITA service, the petitioners continue to fail to serve all parties
8 entitled to NITA service. *Green v. Linn County*, ___ Or LUBA ___ (LUBA No
9 2021-068, Nov 9, 2021); *Wendt v. City of Klamath Falls*, ___ Or LUBA ___
10 (LUBA No 2020-026, Mar 18, 2020), *aff'd*, 304 Or App 874, 466 P3d 106
11 (2020); *Bruce v. City of Hillsboro*, 32 Or LUBA 382, 387 (1997). Accordingly,
12 we dismiss this appeal.

13 The appeal is dismissed.²

² On January 13, 2022, petitioners filed a motion for a stay of the challenged decision. Intervenors-respondents filed a response to the motion for stay and petitioners filed a reply. The motion for stay is moot.