

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

3
4 BRIAN TOWEY, KIM KEAN, DENISE MCCRAVEY,
5 JOHN MCGRORY, and JEANIE SENIOR,
6 *Petitioners,*

7
8 and

9
10 SUSAN GARRETT CROWLEY,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 CITY OF HOOD RIVER,
16 *Respondent,*

17
18 and

19
20 THRIVE HOOD RIVER,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2021-057

24
25 FINAL OPINION
26 AND ORDER

27
28 Appeal from City of Hood River.

29
30 Brian Towey, Kim Kean, Denise McCravey, John McGrory, and Jeanie
31 Senior represented themselves.

32
33 Susan Garrett Crowley represented themselves.

34
35 Daniel H. Kearns represented respondent.

36
37 Alexis Biddle represented intervenor-respondent.
38

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

3
4 RYAN, Board Member, did not participate in the decision.

5
6 DISMISSED 03/21/2022

7
8 You are entitled to judicial review of this Order. Judicial review is
9 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the city council’s adoption of Ordinance 2061, amending Hood River Municipal Code (HRMC) chapter 17.03, Land Use Zones, and adopting HRMC chapter 17.25, Middle Housing Development Standards.

BACKGROUND

On May 12, 2021, the city issued notice of its decision adopting Ordinance 2061, amending HRMC title 17, Zoning.¹ On May 17, 2021, petitioners filed their notice of intent to appeal the city’s decision. On June 4, 2021, intervenor-petitioner filed their motion to intervene on the side of petitioners and intervenor-respondent filed their motion to intervene on the side of the city.

On December 21, 2021, we issued our order settling the record. OAR 661-010-0030(1) provides that “the petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board,” making the petition for review in this appeal due on

¹ The stated purpose of the amendment is to

“support the City’s Housing goal of more efficient use of urban residential land; support development of diverse housing types in accordance with the Comprehensive Plan Housing Needs Analysis; increase the variety of housing types available for households; provide opportunities for small, dwelling units within existing neighborhoods; increase opportunities for home ownership; and provide opportunities for creative and high-quality infill development that is compatible with existing neighborhoods.”
Record 12.

1 January 11, 2022.² OAR 661-010-0067(2) provides, subject to exceptions that
2 are not relevant here, that the deadline for filing the petition for review shall not
3 be extended without the written consent of the parties.³OAR 661-010-0067(4)
4 provides that a motion for extension of time

5 “must be filed with the Board within the time required for
6 performance of the act for which an extension of time is requested.
7 *A motion for extension of time that is not accompanied by a written*
8 *consent by all parties to the requested extension shall state whether*
9 *all parties to the appeal have agreed to the motion for extension of*
10 *time, orally or otherwise.” (Emphasis added.)*

11 On January 11, 2022, petitioner John McGrory filed a pleading titled
12 “Unopposed Petitioners’ Motion for Extension of Time,” which requested an
13 extension of time for petitioners to file their petition for review “for the reason
14 that John McGrory, the principal drafter of the Petition, has been in quarantine
15 for the last 10 days and is unable to timely perform the clerical and administrative
16 tasks of completing and filing the Petition.” Petitioner McGrory’s motion stated

² Petitioners filed their notice of intent to appeal on May 17, 2021. This appeal is governed by OAR chapter 661, division 10, as effective on that date. OAR 661-010-0000.

³ OAR 661-010-0067(2) provides, in part:

“Except as provided in this section, in no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties. Written consent may include facsimile signatures. The Board may, on a motion of a party or its own motion, extend the deadline for filing the petition for review to allow time to rule on a motion to dismiss or a motion to take evidence.”

1 that the city did not oppose the motion, but it did not indicate the position of
2 either intervenor-petitioner or intervenor-respondent, and it did not include
3 written evidence of consent to the extension by any party. On January 14, 2022,
4 we issued an order directing petitioners to file a motion for extension of time
5 conforming to our rules within seven days of the date of the order, including
6 written evidence of consent to the extension by all parties.

7 On January 14, 2022, we received petitioners' petition for review.⁴ On
8 January 21, 2022, petitioners filed an amended motion for extension of time,
9 which remained noncompliant with our rules. Although the amended motion
10 included the written consent of the city and intervenor-petitioner, it did not
11 include the written consent of intervenor-respondent. A declaration of petitioner
12 Brian Towey attached to the amended motion states that they initially contacted
13 intervenor-respondent concerning consent to the extension on January 19, 2022,
14 but had not received a yes or a no response by the amended motion due date.

15 On January 27, 2022, we issued an order denying petitioners' amended
16 motion for extension of time to file their petition for review because it did not

⁴ Petitioners' petition for review, sent to LUBA by certified mail on January 13, 2022, did not comply with our rules. On January 18, 2022, we issued an order confirming that we had not ruled on the motion for extension of time but directing petitioners to file a compliant petition for review. On January 18, 2022, we received petitioners' precautionary motion to amend their petition for review and an amended petition for review. On January 26, 2022, we received a second amended petition for review.

1 include written evidence of intervenor-respondent's consent to the extension.
2 *Towey v. City of Hood River*, ___ Or LUBA ___ (LUBA No 2021-057, Jan 27,
3 2022). We stated in our order that we would not consider petitioners' petition for
4 review.

5 **MOTION TO DISMISS**

6 On January 24, 2022, the city filed its motion to dismiss the appeal due to
7 petitioners' failure to file their petition for review by the due date of January 11,
8 2022. The city attached to its motion to dismiss a January 24, 2022 letter from
9 intervenor-respondent stating that it did not consent to an extension of time for
10 filing the petition for review. The parties do not dispute that the petition for
11 review was due on January 11, 2022, and that petitioners did not file their petition
12 for review by that date. Petitioners respond that LUBA may excuse the late filing
13 of their petition for review in this case, notwithstanding intervenor-respondent's
14 nonconsent. In addition, whether or not LUBA allows the late petition for review,
15 intervenor-petitioner and petitioners argue that the appeal must proceed to a
16 resolution on the merits of the assignments of error in intervenor-petitioner's
17 brief, which was timely filed. For the reasons set out below, we dismiss this
18 appeal.

19 We begin by describing the applicable statutes and administrative rules.
20 ORS 197.830 governs LUBA review procedures, standing, and deadlines. ORS
21 197.830(11) to (13)(a) provides:

1 “(11) A petition for review of the land use decision or limited land
2 use decision and supporting brief shall be filed with the board
3 as required by the board under subsection (13) of this
4 section.”

5 “(12) The petition shall include a copy of the decision sought to be
6 reviewed and shall state:

7 “(a) The facts that establish that the petitioner has standing.

8 “(b) The date of the decision.

9 “(c) The issues the petitioner seeks to have reviewed.

10 “(13)

11 “(a) The board shall adopt rules establishing deadlines for
12 filing petitions and briefs and for oral argument.”

13 OAR 661-010-0030(1) provides that “[f]ailure to file a petition for review
14 within the time required by this section, and any extensions of that time under
15 OAR 661-010-0045(8) or OAR 661-010-0067(2), shall result in dismissal of the
16 appeal and forfeiture of the filing fee and deposit for costs to the governing body.”

17 OAR 661-010-0005 provides that LUBA’s rules of procedure

18 “are intended to promote the speediest practicable review of land
19 use decisions and limited land use decisions, in accordance with
20 ORS 197.805–197.855, while affording all interested persons
21 reasonable notice and opportunity to intervene, reasonable time to
22 prepare and submit their cases, and a full and fair hearing. The rules
23 shall be interpreted to carry out these objectives and to promote
24 justice. Technical violations not affecting the substantial rights of
25 parties shall not interfere with the review of a land use decision or
26 limited land use decision. *Failure to comply with the time limit for*
27 *filing a notice of intent to appeal under OAR 661-010-0015(1) or a*
28 *petition for review under OAR 661-010-0030(1) is not a technical*
29 *violation.” (Emphasis added.)*

1 Our case law provides that the deadline to file the petition for review is
2 strictly enforced and, where that deadline is not met, the appeal will be dismissed.
3 In *Ramsey v. City of Portland*, the petitioner filed a motion for extension of time
4 to file the petition for review based upon “the size of the record, the complexity
5 of the constitutional issues involved in this appeal, and the press of other litigation
6 in which petitioner’s attorney is currently engaged.” 22 Or LUBA 295, 300
7 (1991). The motion included the written consent of the city, but it did not include
8 the written consent of at least one of the intervenors-respondents. That
9 intervenor-respondent moved to dismiss the appeal based upon failure to file the
10 petition for review within the time required by our rules. The petitioner argued
11 that the consent requirement in OAR 661-010-0067(2) exceeded our statutory
12 authority. We concluded that ORS 197.830 expressly gives us authority to adopt
13 rules establishing deadlines for filing petitions for review and that that authority
14 necessarily includes the authority to determine when to grant extensions. We
15 dismissed the appeal.

16 In *ODOT v. City of Phoenix*, 50 Or LUBA 548 (2005), the petitioner failed
17 to file a petition for review by the due date. After the due date passed, the
18 petitioner filed a motion for extension of time to file the petition for review. We
19 dismissed the appeal, explaining:

20 “The intervenors in this appeal have not consented to extend the time
21 for filing the petition for review, as required by OAR 661-010-
22 0067(2). The deadline for filing the petition for review is strictly
23 enforced, and failure to comply with that deadline is not a mere

1 technical violation. There is no indication in this case that
2 intervenors consented, either orally or in writing, to the * * *
3 stipulated extension, nor that they had or have any plans to do so.”
4 *ODOT*, 50 Or LUBA at 550 (citations omitted).

5 In *Bauer v. City of Portland*, 37 Or LUBA 489 (2000), the intervenor-
6 respondent did not consent to an extension of time to file the petition for review
7 and moved to dismiss the appeal. We explained that the consent of all the parties
8 was required and, because the intervenor-respondent did not consent to the late
9 filing of the petition for review, we dismissed the appeal.

10 It is undisputed that no petitioner timely filed a petition for review, as
11 provided for in OAR 661-010-0030(1), in this case. On February 7, 2022,
12 petitioners filed a motion for reconsideration of our order denying the motion for
13 extension of time to file the petition for review. Petitioners argue that we have
14 discretion to extend the deadline for the petition for review given that we did so
15 without the consent of the parties in a case where a procedural error by LUBA
16 resulted in substantial prejudice to the intervenors-petitioners, *Confederated*
17 *Tribes v. Jefferson County*, 42 Or LUBA 597 (2002).⁵

⁵ In *Confederated Tribes*, we extended the deadline for filing the petition for review and the intervenors-petitioners’ brief on our own motion, without the written consent of the parties, because we determined that an administrative procedural error by LUBA resulted in substantial prejudice to the parties. It is LUBA’s regular practice to send a letter to all the parties in an appeal, advising them of the date LUBA received the record. If there are no objections to the record, then the petition for review is due 21 days after LUBA receives the record. OAR 661-010-0030(1). In *Confederated Tribes*, LUBA received the record but, through an oversight, did not send its usual letter to all the parties in the appeal,

1 Petitioners are not represented by legal counsel, and they have identified
2 petitioner Towey as the lead petitioner. Petitioners explain that petitioner
3 McGrory was performing a majority of the work on their petition for review and
4 that McGrory required additional time to complete the petition for review due to
5 what petitioners argue were delays caused by the COVID-19 pandemic.⁶ As
6 stated in our order denying the motion for extension of time, we are sympathetic
7 to petitioners' circumstances. We recognize both the pandemic and the
8 complexities of coordinating multiple petitioners and *pro se* litigation. LUBA
9 does not, however, distinguish between parties that are represented by lawyers

advising them that the record had been received. We concluded that the intervenors-petitioners established that LUBA's error would have resulted in prejudice to their substantial rights unless the deadline for filing the petition for review and the intervenors-petitioners' brief was extended. Differently, here, the petition for review was not filed late due to any alleged or actual administrative error by LUBA. *Confederated Tribes* does not assist petitioners.

⁶ Petitioners explain that they were especially sensitive to the risks of COVID-19 due to their ages and the COVID-19-related hospitalization of petitioner Towey in September 2021. Motion for Reconsideration 2-3. Petitioner McGrory, the primary drafter of the late petition for review, was in COVID-19 quarantine the week before the petition for review was due. In an email to intervenor-petitioner and the city's attorney, which is an exhibit to a declaration of petitioner McGrory that is attached to the amended motion for extension of time, McGrory explained that they had recently retired and estimated that they needed a maximum of three extra days to complete the clerical and administrative tasks related to the filing of the late petition for review. In a declaration attached to the motion for reconsideration, petitioner McGrory explained that they worked with a typing service and a copying service and visited the post office to mail the late petition for review.

1 and parties that are not. *Sommer v. City of Cave Junction*, 56 Or LUBA 818, 819
2 (2007) (LUBA does not distinguish between lawyers and nonlawyers in
3 determining whether to award attorney fees under ORS 197.830(15)(b)). Here,
4 LUBA issued an order providing petitioners additional time to obtain the consent
5 of all parties to the requested extension. Petitioners were unable to do so. LUBA
6 will not, in this case, extend the deadline for the petition for review on petitioners'
7 motion without the consent of intervenor-respondent.

8 Again, the parties do not dispute the fact that petitioners did not file their
9 petition for review within the time required by our rules. Petitioners and
10 intervenor-petitioner argue, however, that the appeal should continue, even if we
11 do not excuse petitioners' late filing, because intervenor-petitioner timely filed a
12 brief. Our rules provide that an intervenor-petitioner's brief is due at the same
13 time as a petition for review, and intervenor-petitioner filed their brief on the
14 January 11, 2022 due date. OAR 661-010-0050(6)(a). The city maintains,
15 however, that the appeal must be dismissed in its entirety because petitioners did
16 not timely file their petition for review and intervenor-petitioner elected not to
17 file a notice of intent to appeal. The city contends that intervenor-petitioner's
18 appeal is contingent on petitioners' appeal and that, if we dismiss petitioners'
19 appeal, the appeal must be dismissed in its entirety. We agree.

20 The issues in this appeal call us to interpret our own rule, OAR 661-010-
21 0030(1). In construing a statute, we will consider the text, context, and legislative
22 history of the law at issue in order to determine the intent of the enacting

1 legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d
2 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We
3 apply that same analysis in interpreting our own administrative rules.

4 We observe that ORS 197.830 refers to a petition for review and
5 supporting brief. *See* ORS 197.830(11) (“A petition for review of the land use
6 decision or limited land use decision and supporting brief shall be filed with the
7 board as required by the board under subsection (13) of this section.”); ORS
8 197.830(13)(a) (“The board shall adopt rules establishing deadlines for filing
9 petitions and briefs and for oral argument.”). Differently, LUBA’s applicable
10 rules of procedure refer to “the petition for review” as the brief filed by the
11 petitioner.

12 The text of OAR 661-010-0030(1) provides that “*the* petition for review”
13 is due within 21 days after the date the record is settled, that “[t]he petition shall
14 also be served on the governing body and any party who has filed a motion to
15 intervene,” and that, if “*a* petition for review” is not filed on time, the *appeal* (not
16 the *petitioner*) will be dismissed. (Emphases added.) In a case with multiple
17 petitioners, if *a* petition for review is filed on a timely basis, perhaps signed by
18 only one petitioner, the appeal will not be dismissed. If, however, no petitioner
19 timely files a petition for review, the appeal will be dismissed. OAR 661-010-
20 0030(1); *see also* OAR 661-010-0005 (failure to comply with the time limit for
21 filing a petition for review under OAR 661-010-0030(1) is not a technical
22 violation).

1 Our conclusion that the phrase “a petition for review” in OAR 661-010-
2 0030(1) refers to a petitioner’s brief is supported by ORS 197.830. ORS
3 197.830(11) refers to “[a] petition for review,” and ORS 197.830(12)(a)
4 provides, “The petition shall include a copy of the decision sought to be reviewed
5 and shall state * * * [t]he facts that establish that the petitioner has standing.”

6 Further support for our conclusion that OAR 661-010-0030(1) refers to a
7 petitioner’s brief, as opposed to an intervenor-petitioner’s brief, is provided by
8 the provision in OAR 661-010-0030(1) that failure to timely file a petition for
9 review will result in forfeiture of the deposit for costs, an expense incurred by
10 petitioners, not intervenors-petitioners.⁷

11 OAR 661-010-0075 also serves to clarify the distinction between
12 petitioners’ petition for review and intervenor-petitioner’s brief, and the
13 appropriate remedy. OAR 661-010-0075(1)(c) explains:

14 “If a record has been filed and a petition for review is not filed within
15 the time required by these rules, and the governing body files a cost
16 bill pursuant to this section requesting forfeiture of the filing fee and
17 deposit, the filing fee and deposit required by OAR 661-010-
18 0015(4) shall be awarded to the governing body as cost of
19 preparation of the record. See OAR 661-010-0030(1).”

20 OAR 661-010-0015(4) concerns the deposit for costs and the filing fee for the
21 notice of intent to appeal. Again, only a petitioner pays the deposit for costs. In

⁷ Again, this appeal was filed in May 2021. Prior to July 2021, our rules required that petitioners include a deposit for costs with their notice of intent to appeal.

1 addition, only a petitioner pays the filing fee for a notice of intent to appeal. An
2 intervenor-petitioner does not file a notice of intent to appeal. An intervenor-
3 petitioner pays a filing fee for intervention under OAR 661-010-0050(3).

4 According to intervenor-petitioner, we should allow intervenor-petitioner
5 to present the issues in their brief because an intervenor is a party to the appeal
6 under ORS 197.830(7) and because LUBA may not construe OAR 661-010-
7 0030(1) in contravention of that statute to prevent intervenor-petitioner from
8 submitting their case.

9 ORS 197.830 provides that any person who has standing to bring an appeal
10 may commence an appeal by filing a notice of intent to appeal. For circumstances
11 such as this appeal, where the local government provided a hearing, any person
12 who “[a]ppeared before the local government, special district or state agency
13 orally or in writing” may commence an appeal by filing a notice of intent to
14 appeal. ORS 197.830(1), (2). In addition, ORS 197.830(7) provides, in part:

15 “(a) Within 21 days after a notice of intent to appeal has been filed
16 with the board under subsection (1) of this section, any person
17 described in paragraph (b) of this subsection *may intervene in*
18 *and be made a party to the review proceeding* by filing a
19 motion to intervene and by paying a filing fee of \$100.

20 “(b) Persons who may intervene in and be made a party to the
21 review proceedings, as set forth in subsection (1) of this
22 section, are:

23 “(A) The applicant who initiated the action before the local
24 government, special district or state agency; or

1 “(B) Persons who appeared before the local government,
2 special district or state agency, orally or in writing.”
3 (Emphasis added.)

4 Intervenor-petitioner acknowledges that we have dismissed appeals where
5 the petitioner is found to lack standing despite the intervenor-petitioner’s timely
6 intervention and party status. For example, in *Waters v. Marion County*, we
7 dismissed an appeal because the petitioner did not appear before the local
8 government and, therefore, lacked standing to appeal to LUBA. 33 Or LUBA 751
9 (1997). We dismissed that appeal, despite the fact that the intervenor-petitioner
10 did appear before the local government, because the intervenor-petitioner had not
11 filed their own timely notice of intent to appeal. *Id.* We explained that, “when a
12 notice of intent to appeal is jurisdictionally defective, is defective for other
13 reasons which result in prejudice or unfairness to a respondent, or is withdrawn,
14 the appeal must be dismissed, notwithstanding the presence of an intervenor-
15 petitioner.” *Id.* at 754 (citing *Gross v. Washington County*, 17 Or LUBA 640,
16 645-46 (1989)).

17 Similarly, in *Marylhurst Neighborhood Assoc. v. City of West Linn*, we
18 dismissed the appeal over the intervenor-petitioner’s objection after the petitioner
19 withdrew from the appeal. 52 Or LUBA 612 (2006). We explained that, “after
20 the petitioner withdraws from the appeal, any intervenors may not continue the
21 appeal, and the appeal must be dismissed.” *Id.* at 613 (citing *Waters*, 33 Or LUBA
22 at 754; *National Advertising Company v. City of Portland*, 20 Or LUBA 79, 85
23 (1990); *Gross*, 17 Or LUBA 650). We repeated that “[t]he effect of our decision

1 may be that potential intervenors wishing to avoid the uncertainty of relying on
2 a petitioner to timely file and maintain a notice of intent to appeal must file their
3 own notices of intent to appeal * * *.” *Id.* at 613-14 (quoting *Gross*, 17 Or LUBA
4 at 646 n 6).

5 Intervenor-petitioner attempts to distinguish those appeals because, in this
6 appeal, it is undisputed that petitioners appeared before the local government and
7 filed a timely notice of intent to appeal, and petitioners have not withdrawn their
8 notice of intent to appeal. Instead, the reason for dismissal of this appeal is
9 operation of OAR 661-010-0030(1), which requires dismissal of the appeal due
10 to petitioners’ failure to timely file a petition for review. While we agree that this
11 case presents different factual circumstances and a different basis for dismissal,
12 the essential issue is the same—namely, whether an intervenor-petitioner has
13 independent statutory standing to maintain an appeal. We conclude that ORS
14 197.830(7) does not confer upon an intervenor independent statutory standing to
15 maintain an appeal that must otherwise be dismissed under OAR 661-010-
16 0030(1).

17 We also do not agree with intervenor-petitioner that dismissal of this
18 appeal violates ORS 197.830(7). The statutory scheme for standing in ORS
19 197.830 differentiates between a petitioner, who files a notice of intent to appeal,
20 and an intervenor, who files a motion to intervene. ORS 197.830(1) provides that
21 LUBA review is commenced by filing a notice of intent to appeal. ORS
22 197.830(2)(a) provides that a person may petition the board for review if the

1 person filed a notice of intent to appeal. ORS 197.830(7) permits certain persons
2 to intervene in the review proceeding, and our rules permit intervenors to file
3 briefs. However, nothing in ORS 197.830 provides an intervenor with a right to
4 independently maintain an appeal where our rules otherwise require that the
5 appeal be dismissed.

6 Intervenor-petitioner argues that dismissing this appeal exceeds our
7 statutory authority. We disagree. ORS 197.820(4)(a) provides that “[LUBA]
8 shall adopt rules governing * * * [t]he conduct of review proceedings brought
9 before it under ORS 197.830 to 197.845.” ORS 197.830(11) and (13) delegate to
10 LUBA authority to “adopt rules establishing deadlines for filing petitions and
11 briefs.” OAR 661-010-0030(1) was enacted within that authority and requires
12 dismissal of this appeal. OAR 661-010-0005 provides that failure to comply with
13 the time limit for filing a petition for review under OAR 661-010-0030(1) is not
14 a technical violation.

15 In *Canfield v. Lane County*, the petitioner sent their petition for review to
16 LUBA, on its due date, by Federal Express rather than using the United States
17 Postal Service (USPS). 59 Or LUBA 505 (2009). At that time, OAR 661-010-
18 0075(2)(a) provided that, if the petition for review was sent by USPS, it was filed
19 on the date of mailing. Otherwise, it was filed on the date of LUBA’s receipt. The
20 petitioners argued that the use of Federal Express did not result in delay and that
21 the late filing was harmless. However, because the petitioners did not use USPS,

1 the petition for review was not timely filed, and we dismissed the appeal. We
2 explained:

3 “Even if the question raised by intervenor-respondents’ motion to
4 dismiss is not a *jurisdictional* question, OAR 661-010-0030(1)
5 specifies that dismissal is the consequence for filing an untimely
6 petition for review, and OAR 661-010-00005 makes it clear that
7 such a failure may not be overlooked as a mere ‘technical violation’
8 of LUBA’s rules. Together, OAR 661-010-0005 and OAR 661-010-
9 0030(1) therefore establish that even if timely filing of the petition
10 for review does not amount to a ‘jurisdictional’ requirement, those
11 rules do establish that failure to file a petition for review before the
12 filing deadline expires is nevertheless a compulsory non-
13 jurisdictional basis for dismissing an appeal. *See Ray v. Douglas*
14 *County*, 140 Or App 24, 28, 914 P2d 26 (1996) (‘it is a truism that
15 courts and agencies may have discretionary or even compulsory
16 non-jurisdictional bases for dismissing proceedings’). LUBA has
17 long interpreted and applied OAR 661-010-0030(1) to compel
18 dismissal of an appeal where the petition for review is not timely
19 filed.” *Id.* at 511 (emphasis in original).

20 We recognize that dismissal is a harsh result for intervenor-petition in this
21 appeal, where intervenor-petitioner timely filed a brief. However, intervenor-
22 petitioner could have avoided the uncertainty of relying on petitioners to timely
23 file a petition for review by filing their own notice of intent to appeal.

24 OAR 661-010-0010(11) provides, “‘Party’ means the petitioner, the
25 governing body and any person who intervenes as provided in OAR 661-010-
26 0050. ‘Party’ does not include a state agency that files a brief under ORS
27 197.830(8) or an amicus participating under OAR 661-010-0052.”⁸ However,

⁸ ORS 197.830(8) states:

1 this definition does not mean that petitioners, governing bodies, and intervenors
2 are equivalent within our rules. OAR 661-010-0030(1) provides that the petition
3 for review shall be filed with LUBA within 21 days after the record is received
4 or settled by LUBA and “served on the governing body and any party who has
5 filed a motion to intervene.” The plain language of that rule requires that the brief
6 filed under OAR 661-010-0030 be served on intervenors, distinguishing them
7 from petitioners.

8 OAR 661-010-0075(1)(b) also recognizes intervenors and petitioners
9 separately as potentially prevailing parties—the terms are not interchangeable:

10 “Costs may be recovered only for the items set forth in this
11 subsection.

12 “(A) *If the petitioner is the prevailing party, the petitioner may be*
13 *awarded the cost of the filing fee.*

14 “(B) If the governing body is the prevailing party, the governing
15 body may be awarded copying costs for the required number
16 of copies of the record, at 25 cents per page, whether or not
17 the governing body actively participated in the review.

18 “(C) Costs awarded to the governing body pursuant to this section
19 shall be paid from the deposit required by OAR 661-010-
20 0015(4) and shall not exceed the amount of that deposit.

“If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent’s brief is due and shall be accompanied by a filing fee of \$100.”

1 “(D) *If an intervenor under OAR 661-010-0050 or a state agency*
2 *under OAR 661-010-0038 is the prevailing party, the*
3 *intervenor or state agency may be awarded the cost of the fee*
4 *to intervene or to file a state agency brief.*” (Emphases added.)

5 An intervenor potentially recovers the cost of the fee to intervene, not the “filing
6 fee.” It is a petitioner who potentially recovers the cost of the filing fee.

7 Additional contextual support for the distinction between petitioners and
8 intervenors is found in OAR 661-010-0050. OAR 660-010-0050(2) provides that
9 a party may intervene “*on the side of the petitioner or the respondent.*” (Emphasis
10 added.) OAR 661-010-0050(6) sets out requirements for the “Intervenor’s Brief,”
11 distinct from the petitioner’s petition for review, indicating that intervenor’s brief
12 is not the same as the petitioner’s petition for review. OAR 661-010-0050(6)
13 states:

14 “(a) *If intervention is sought as a petitioner, the brief shall be filed*
15 *within the time limit for filing the petition for review, and*
16 *shall satisfy the requirements for a petition for review in OAR*
17 *661-010-0030.*

18 “(b) *If intervention is sought as a respondent, the brief shall be*
19 *filed within the time for filing a respondent’s brief and shall*
20 *satisfy the requirements for a respondent’s brief in OAR 661-*
21 *010-0035.*” (Emphases added.)

22 We consider these provisions in a manner that gives effect to all. ORS 174.010.⁹

23 If intervention is sought *on the side of a petitioner and as a petitioner*, it is sought
24 as an intervenor-petitioner. Intervenors-petitioners do not become petitioners.

⁹ ORS 174.010 provides:

1 In *National Advertising Company*, 20 Or LUBA 79, the petitioners and the
2 city reached a negotiated settlement and filed a motion to dismiss their appeal.
3 The intervenors-petitioners argued that they retained the ability to continue the
4 appeal because the petitioners had not withdrawn their appeal and because a valid
5 notice of intent to appeal remained in place. The petitioners asked that we treat
6 their motion to dismiss as a motion to withdraw the appeal. We did so and
7 dismissed the appeal.

8 Here, petitioners and intervenor-petitioner cite *National Advertising*
9 *Company* for its citation of *Todd v. Jackson County*, 14 Or LUBA 233 (1986). In
10 *Todd*, we denied the county’s motion to dismiss and considered the intervenor-
11 petitioner’s assignments of error despite the fact that the petitioner had not timely
12 filed their petition for review. *Todd* was, however, decided under administrative
13 rules that are no longer in effect, and it is not helpful to our decision.¹⁰ As we
14 explained in our final opinion and order, “Ann Todd was the *original* petitioner
15 in [that] case. Her petition for review was dismissed on December 16, 1985

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

¹⁰ LUBA’s December 16, 1985 order rejecting the county’s motion to dismiss in *Todd v. Jackson County* was not published, and LUBA does not possess a copy of it.

1 because her petition for review was filed after the time allowed by OAR 661-10-
2 30(1).” *Id.* at 239 n 4 (emphasis added). At that time, LUBA’s rules provided that
3 any person identified in the notice of intent to appeal other than the petitioner and
4 the governing body could participate as a party in the appeal if they filed a
5 statement of intent to participate within 15 days of service of the notice of intent
6 to appeal. OAR 661-010-0020(1) (Oct 3, 1983).¹¹ LUBA’s rules at that time also
7 provided that, except for those persons identified in the notice of intent to appeal,
8 any person who could show standing could file a motion to intervene “as a
9 petitioner” up until the time the petition for review was due. OAR 661-010-
10 0050(1)(a) (Oct 3, 1983).¹² As explained above, our rules now provide that a

¹¹ OAR 661-010-0020 (Oct 3, 1983) provided:

“(1) Any person identified in the Notice, other than the petitioner and governing body, who desires to participate as a party in the appeal shall within 15 days of service of the Notice upon such person, file with the Board and serve on all parties designated in the Notice, a Statement of Intent to Participate. The Statement may be in the form set forth in Exhibit 2 of these rules.

“(2) Unless otherwise advised in writing, the Board shall designate as respondents all persons filing a Statement of Intent to Participate.”

¹² OAR 661-010-0050 (Oct 3, 1983) provided:

“(1) Except for those persons identified in the Notice of Intent to Appeal as required by rule 661-10-015(2)(f), any person who can show entitlement to standing under rule 661-10-020(3), (a) through (e) may intervene in and become a party to any

1 party may file a motion to intervene “on the side of the petitioner” within 21 days
2 of the date the notice of intent to appeal is filed. OAR 661-010-0050(2). Again,
3 participation “on the side of the petitioner” is not the same as participation “as a
4 petitioner.” Rather, it establishes a party’s status as an intervenor-petitioner.

5 Petitioners and intervenor-petitioner also cite LUBA’s unpublished June
6 20, 2002 order in *Confederated Tribes* but, like *Todd*, that citation does not
7 support allowing intervenor-petitioner to continue this appeal. In *Confederated*
8 *Tribes*, the county sought to have the intervenors-petitioners dismissed as parties
9 to the appeals because they did not file briefs. The petitioner filed a total of four
10 separate petitions for review in those consolidated cases. We concluded that

review proceeding before the Board involving that land use decision. Such intervention must be by written motion and must contain the facts which show that the person is entitled to intervene. The motion to intervene shall be filed within the time for:

“(a) Filing the petition for review, if intervention is sought as a petitioner, or the time for

“(b) Filing the respondent’s brief, if intervention is sought as a respondent.

“(2) The motion should set forth assignments of error or responses to assignments of error, as appropriate, with supporting argument. The motion shall contain intervenor’s brief and shall conform to the specifications for the petition for review as set forth in rule 661-10-025. Where intervention is sought as a respondent, no reply by the petitioner will be allowed without permission of the Board.”

1 dismissal of the intervenors-petitioners was not an appropriate remedy. That is
2 not the case here, where no petitions for review under OAR 661-010-0030 were
3 filed.

4 Intervenor-petitioner also argues that we must proceed to the merits of the
5 assignments of error in intervenor-petitioner’s brief because we allow
6 intervenors-petitioners to “raise in [an] appeal any issue which they could
7 properly raise had they filed separate notices of intent to appeal and pursued
8 separate appeals.” *Stotter v. City of Eugene*, 18 Or LUBA 135, 144 (1989). In
9 *Stotter*, we rejected an argument that we should limit intervenors-petitioners’
10 arguments to those in support of issues raised by petitioners because it “would
11 place intervenors-petitioner[s] in the awkward position of determining (or
12 guessing) in advance what issues petitioners will raise in [their] brief[s]” and
13 because it would not result in expeditious appeals. *Id.* at 143. We did not address
14 whether an intervenor-petitioner has independent statutory standing to maintain
15 an appeal. *Stotter* does not assist intervenor-petitioner.

16 Finally, intervenor-petitioner argues that they should be found to have the
17 same rights as a petitioner, citing *Schlumberger Technologies v. TriMet*, 149 Or
18 App 316, 320-21, 942 P2d 862 (1992). *Schlumberger* concerned the status of an
19 intervenor under the Oregon Rules of Civil Procedure and is inapposite. LUBA
20 is not required to adopt policies similar to the court.

21 The motion to intervene is due within 21 days of the filing of the notice of
22 intent to appeal. OAR 661-010-0050(2). The intervenor does not file “the petition

1 for review” referenced in OAR 661-010-0030. Rather, the intervenor files the
2 “intervenor’s brief” referenced in OAR 661-010-0050(6). Accordingly, we
3 conclude that the timely filing of intervenor-petitioner’s brief does not cure the
4 failure of petitioners to timely file their petition for review.¹³

5 The appeal is dismissed.

¹³ Petitioners’ motion for reconsideration of our order denying petitioners’ motion for extension of time to file the petition for review is denied. Similarly, because the appeal is dismissed, multiple other motions pending as of the date of this decision are moot, including petitioners’ December 30, 2021 motion to take official notice; petitioners’ December 30, 2021 motion to take evidence not in the record; petitioners’ January 13, 2022 supplemental motion to take evidence not in the record; petitioners’ January 14, 2022 precautionary motion to amend their petition for review; and intervenor-petitioner’s February 7, 2022 motion for reconsideration of our order granting the city’s motion for extension of time to file the response brief, motion for overlength reply brief, and motion for extension of time to file the reply brief.