BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEBRA O'ROURKE, PAUL DALGLEISH
and DUANE JORGENSON,
Petitioners,

vs.

UNION COUNTY,
Respondent,

and

R.D. MAC, INC.,
Intervenor-Respondent.

LUBA No. 2007-077

ORDER

MOTION TO INTERVENE

R.D. Mac, Inc. (intervenor), the applicant below, moves provisionally to intervene on the side of respondent. Intervenor explains that the motion is "provisional," because intervenor does not consent to LUBA's jurisdiction, and therefore intervenor moves to intervene for the limited purpose of arguing intervenor's motion to dismiss and in opposition to petitioners' motion for stay.

There is no opposition to the provisional motion to intervene, and it is granted. We understand intervenor to request that, if LUBA denies the motion to dismiss, intervenor be granted "intervenor status throughout the life of this appeal to preserve Movant's right to contest LUBA's jurisdiction in this matter." Provisional Motion to Intervene, 3. As discussed below, we deny intervenor's motion to dismiss. Accordingly, intervenor is granted intervenor status for all purposes in this appeal.

MOTION TO DISMISS

As explained in our order dated April 12, 2007, on that date LUBA received a notice of intent to appeal that erroneously listed intervenor as the respondent rather than the county. Further, Section III of the notice listed the name, address and telephone number of intervenor's registered agent, who represented intervenor before the county, rather than the name, address and telephone number of the governing body and the governing body's legal counsel, as required by OAR 661-010-0015(3)(f)(B).[1] Section IV of the notice correctly listed the name and contact information for the applicant's representative. *See* Exhibit 1 to OAR 661-010-0015. The certificate of service attached to notice of intent to appeal states that it was served by mail on R.D. Mac, Inc. However, the notice of intent to appeal was apparently not served on the county or any of the other persons listed in Section V of the notice, as required by OAR 661-010-0015(2). *See* n 2.

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[1] OAR 661-010-0015(3) provides, in relevant part:

> "Contents of Notice: The Notice shall be substantially in the form set forth in Exhibit 1 and shall contain:
>
> "(a) A caption which sets forth the name(s) of the person(s) filing the Notice, identifying the person(s) as petitioner(s), and the name of the governing body, identifying the governing body as respondent;
>
> "* * * * *
>
> "(f) The name, address and telephone number of each of the following:
>
> "(A) The Petitioner. * * *
>
> "(B) The governing body and the governing body's legal counsel;
>
> "(C) The applicant, if any (and if other than the petitioner). If an applicant was represented by an attorney before the governing body, then the name, address and telephone number of the applicant's attorney shall also be included;
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> "(D) Any other person to whom written notice of the land use decision or limited land use decision was mailed as shown on the governing body's records. The telephone number may be omitted for any such person."

Our April 12, 2007 order required petitioners to file with LUBA and serve on the county and all other necessary persons within seven days of that order an amended notice of intent to appeal that (1) lists Union County rather than R.D. Mac, Inc. as the respondent in the caption, and (2) provides the name, address and telephone number of the governing body and the governing body's legal counsel in Section III of the notice, instead of R.D. Mac, Inc.

The April 12, 2007 order also noted that petitioners had filed a motion to stay the challenged decision pursuant to OAR 661-010-0068, and that pursuant to our rules "any responses to the motion to [stay] shall be due 14 days from the date the motion to stay was served." April 12, 2007 Order, 2.

On April 16, 2007, petitioners mailed by first class mail an amended notice of intent to appeal, which the Board received on April 18, 2007. The amended notice corrects the two deficiencies noted in our previous order. The certificate of service attached to the amended notice states that it was served on the Union County Commission and the county district attorney. The amended notice was not served at that time on intervenor or any other persons named in Section V of the notice, as required by our order and OAR 661-010-0015(2). However, on April 26, 2007, petitioners filed with LUBA a certificate of service stating that petitioners served copies of the amended notice on intervenor and all other persons entitled to notice.

On April 23, 2007, intervenor filed a motion to dismiss this appeal, arguing that this appeal should be dismissed because (1) the amended notice of intent to appeal was filed more than 21 days after the date the challenged decision became final, and (2) service defects in both the original and amended notices of intent to appeal prejudiced intervenor's substantial rights.

A. Untimely Filing of the Amended Notice of Intent to Appeal

The county's decision became final on March 26, 2007, which means that in order to be timely filed under OAR 661-010-0015(1)(a), the notice of intent to appeal must be filed

with LUBA on or before April 16, 2007.[2] Under OAR 661-010-0015(1)(b), "[t]he date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice has proof from the post office of such mailing date." The certificate of service to the original notice of intent to appeal states that it was mailed to the Board by registered mail on April 10, 2007. As noted, the Board received the original notice on April 12, 2007. By any calculation, the original notice of intent to appeal was timely filed.

The amended notice of intent to appeal was filed within the seven days specified in our April 12, 2007 order, but was mailed by first class mail (not registered or certified mail) on the 21st day and was not received by LUBA until two days after the 21-day deadline to

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[2] OAR 661-010-0015 provides, in relevant part:

> "(1) Filing of Notice:
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> > "(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) through (5). * * * A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.
> >
> > "(b) The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, provided it is mailed by registered or certified mail and the party filing the Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number. If a Notice is received without payment of the fee and deposit required by section (4) of this rule, the petitioner will be given an opportunity to submit the required fee and deposit. If the filing fee and deposit for costs are not paid within the time set by the Board, the Board will dismiss the appeal.
> >
> > "* * * * *
>
> "(2) Service of Notice: The Notice shall be served on the governing body, the governing body's legal counsel, and all persons identified in the Notice as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed. Service of the Notice as required by this section may be in person or by first class mail. The date of serving such notice shall be the date of mailing."

file the notice of intent to appeal. Intervenor argues that LUBA has no authority to extend the deadline for filing the notice of intent to appeal. Because the amended notice of intent to appeal was not filed on or before the 21st day after the challenged decision became final, intervenor argues, LUBA has no jurisdiction over this appeal.

The unstated premise of intervenor's argument is that an otherwise timely filed notice of intent to appeal that fails to comply with one or more of the requirements for the content of a notice under OAR 661-010-0015(3) is insufficient to establish LUBA's jurisdiction over the appeal, for purposes of OAR 661-010-0015(1)(a). Further, intervenor appears to presume that, in circumstances where a noncompliant notice is filed, an amended or corrected notice that complies with all OAR 661-010-0015(3) content requirements must be filed within the 21 day deadline specified in OAR 661-010-0015(1)(a), in order to establish LUBA's jurisdiction. We disagree with both premises.

LUBA has consistently held that compliance with the requirements for the *content* of a notice under OAR 661-010-0015(3) is not jurisdictional. *Stoloff v. City of Portland*, 51 Or LUBA 812, 817 (2006); *Markham v. Coos County*, 31 Or LUBA 529, 530 (1996). Instead, noncompliance with the requirements of OAR 661-010-0015(3) is treated as a "technical violation" of our rules that does not interfere with our review, unless a party demonstrates that the noncompliance prejudices that party's substantial rights. *Stoloff*, 51 Or LUBA at 817; OAR 661-010-0005.[3] Both *Stoloff* and *Markham* involved the same circumstances

[3] OAR 661-010-0005 provides:

> "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."

present here, an original notice timely filed that failed to comply with some of the requirements of OAR 661-010-0015(3), followed by submission of an amended or corrected notice more than 21 days after the date the challenged decision became final. In both cases, we rejected motions to dismiss the appeals, finding that timely filing of the original notice satisfies the jurisdictional requirements of OAR 661-010-0015(1)(a), and that any amended notice need not be filed within the 21-day deadline set out in that rule.[4]

Intervenor argues that *Stoloff* is distinguishable, because in that case the identity of the correct respondent was uncertain under the terms of an intergovernmental agreement. In the present case, intervenor argues, the identity of the respondent is not in doubt, and therefore there is no excuse for noncompliance. However, our holding in *Stoloff* or similar cases did not turn on the cause or reasonableness of the error in the notice of intent to appeal. The point of *Stoloff* and *Markham* is that partial noncompliance with the requirements for the content of an otherwise timely filed notice of intent to appeal is not jurisdictional or a basis to dismiss the appeal, absent prejudice to other parties' substantial interests. To the extent intervenor urges us to overrule our cases so holding, or apply OAR 661-010-0005 differently in the present case, we decline to do so.

B. Content and Service of the Notice of Intent to Appeal

Intervenor argues, in the alternative, that petitioners' noncompliance with the content and service requirements of OAR 661-010-0015(3) has prejudiced intervenor's substantial rights. Intervenor points out, correctly, that the certificate of service attached to the amended

[4] Our rules do not explicitly authorize or prohibit the filing of an amended notice of intent to appeal intended to correct noncompliance with one or more of the content requirements of OAR 661-010-0015(3), although in practice the Board has both allowed it and ordered it in several cases. We note that OAR 661-010-0075(6) provides that the Board shall give the petitioner the opportunity to file an amended notice of intent to appeal to correct a notice signed by someone other than an active member of the Oregon State Bar on behalf of a corporation, organization or another individual. OAR 661-010-0075(6) specifies that the Board will dismiss the appeal if the amended notice "is not filed within the time set by the Board[.]" Notably, OAR 661-010-0075(6) does not require dismissal if the amended notice is not filed within the 21-day deadline imposed by OAR 661-010-0015(1)(a), which supports our view, expressed in *Stoloff* and *Markham*, that an amended notice is not subject to that 21-day deadline.

notice does not indicate that the amended notice was served on intervenor, as required both by our rules and our April 12, 2007 order.[5] Intervenor states that it has incurred legal costs in determining the status of petitioners' notices of intent to appeal and in responding to LUBA's April 12, 2007 order. Further, intervenor argues that petitioners' noncompliance with OAR 660-010-0015(3) places into uncertainty intervenor's contract relationships that are dependent on the underlying land use approval.

Intervenor does not dispute that the original notice of intent to appeal was timely and correctly served on intervenor. The only defects in the original notice identified in our April 12, 2007 order involved the caption and the identity and contact information for the county. The amended notice corrected those two identified defects. While petitioners failed to serve the amended notice on intervenor, as required by our rules and the order, intervenor has not demonstrated that that failure of service has prejudiced intervenor's substantial rights. The substantial rights to which OAR 660-010-0005 refers are rights to (1) the speediest practicable review, (2) a reasonable opportunity to prepare and submit argument; and (3) a full and fair hearing. *Markham*, 31 Or LUBA at 530, *citing Kellogg Lake Friends v. City of Milwaukie*, 16 Or LUBA 1093, 1095 (1988). Given that intervenor was timely served with the original, almost identical, notice of intent to appeal, it is difficult to understand how petitioners' failure to serve intervenor with the amended notice prejudices any of the above substantial rights. In any case, intervenor in fact obtained a copy of the amended notice shortly after it was filed with LUBA.

C. Deadline to Respond to Motion to Stay

Intervenor also complains that LUBA's April 12, 2007 order established a 14-day deadline for responding to petitioners' motion to stay, as measured "from the date the motion to stay was served." April 12, 2007 Order, 2. Intervenor complains that it had only seven

[5] Intervenor's attorney apparently learned of the amended notice after contacting LUBA's offices shortly after receiving our April 12, 2007 order.

business days after receiving our April 12, 2007 order to file a response to the motion for stay.

The language in our order simply reflected OAR 661-010-0065(2), which provides that a party "may, within 14 days from the date of service of a motion, file a response." The certificate of service attached to the motion for stay filed on April 10, 2007 states that the motion was served on intervenor on that date, and intervenor does not dispute that it received the motion for stay shortly thereafter. Nonetheless, intervenor argues that it has not been "lawfully" served a copy of the motion for stay, apparently because petitioners did not serve a *second* copy of the motion for stay on intervenor when filing the *amended* notice of intent to appeal. Motion to Dismiss 5. We reject the argument.[6]

In sum, intervenor has not established that petitioners' noncompliance with LUBA's rules regarding content or service of the notice of intent to appeal, or anything in LUBA's April 12, 2007 order, prejudiced intervenor's substantial rights or warrants dismissal of this appeal. The motion to dismiss is denied.

MOTION FOR STAY

ORS 197.845 and OAR 661-010-0068 permit LUBA to issue a stay of a local government land use decision while the appeal of that decision is pending at LUBA, where the movant demonstrates, in relevant part, (1) "a colorable claim of error" and (2) "how the movant will suffer irreparable injury if a stay is not granted[.]" OAR 661-010-0068(1). The threshold for establishing a colorable claim of error is quite low, and we assume for purposes of this order that petitioner has established a colorable claim of error. The irreparable injury threshold, however, is demanding. *City of Happy Valley v. City of Damascus*, 50 Or LUBA 711, 715 (2005). To demonstrate irreparable injury, the movant must provide evidence supporting an affirmative answer to each of the following questions:

[6] In addition, we note that if intervenor felt it needed more time to file a response to the motion for stay, it could have filed a motion or request seeking additional time to respond.

"1. Has the petitioner adequately specified the injury he or she will suffer?

"2. Is the identified injury one that cannot be compensated adequately in money damages?

"3. Is the injury substantial and unreasonable?

"4. Is the conduct petitioner seeks to bar through the stay probable rather than merely threatened or feared?

"5. If the conduct is probable, is the resulting injury probable rather than merely threatened or feared?" *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988) (internal citations omitted).

The challenged decision authorizes a temporary, mobile asphalt plant at the site of intervenor's quarry, which includes an existing, smaller asphalt plant in the southeast corner of the property that has been in operation for four years. Petitioner owns a parcel across the street from the quarry. The site of the existing and proposed plants is approximately 1,700 feet from petitioner's residence. In anticipation of winning a bid to supply asphalt for a proposed road improvement, intervenor filed a conditional use application with the county to allow a temporary, portable, larger capacity asphalt plant, to be operated six days per week between the hours of 6:00 a.m. through 6:00 p.m. The county planning commission approved the application with the requested hours of operation, valid for one year. Intervenor appealed the planning commission decision to the county board of commissioners, seeking to expand the initially requested hours of operation to permit the portable plant to operate 24 hours a day, seven days a week. On March 26, 2007, the county board of commissioners issued a final decision, modifying a condition of approval to allow operation of the new plant without time limitations, but prohibiting contemporaneous operation of the old and new plant.[7]

[7] Modified Condition of Approval 2 states:

The motion for stay argues that petitioner will suffer irreparable injury if the stay is not granted "because of health issues." Motion for Stay 2. Petitioner's affidavit states, in relevant part:

> "1. I have standing in the LUBA proceedings to challenge the decision made by the County Commissioners on March 26, 2007, as an owner of property in close proximity to the operating plant of R.D. Mac, Inc. * * *
>
> "2. I have acute and chronic asthma, the symptoms of which are exacerbated by the fumes and dust from [intervenor's] plant operation and its vehicles. The fumes from the plant are very strong during the hours of operation.
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> "3. Prior to R.D. Mac coming to this location, I enjoyed living on my property with my horses and other animals. As R.D. Mac expanded the plant, my asthma symptoms worsened due to increased fumes and dust until I was forced to move from my property and rent a house further away from [the] plant. * * *
>
> "4. The rental house where I am presently living is for sale. The rent I pay for the house where I live is unusually low and I do not anticipate being able to afford to rent another house after the house is sold. Therefore, upon the sale of the rental house where I live now, I will be forced to return to my home. If R.D. Mac is allowed to run an asphalt plant 24 hours per day, 7 days per week, I will not be able to tolerate living at my house without severe and possibly life-threatening problems with my asthmatic condition.
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> "5. If R.D. Mac is allowed continued expansion of their operation to include a new and larger asphalt plant, the truck traffic will quadruple as they will be required to haul in the reground asphalt material to the hot plant and then haul the same material out in the form of asphalt.
>
> "6. If R.D. Mac is allowed to operate an asphalt plan as proposed, the fumes, dust and noise will all increase during the night, a timeframe that the old batch plant typically did not operate.
>
> "7. Since my asthma condition has improved because I moved further from [intervenor's] plant, my physician, Steven Bump, M.D., has

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"The new proposed temporary asphalt plant can operate without time limitations, unless the existing smaller asphalt plant is operating then the new proposed temporary asphalt plant must not be operating."

> advised me that I should not move back to my house next to the asphalt plant quarry. If the asphalt plant is allowed to operate with unrestricted hours, moving back to my house will not be an option. My asthma attacks can be life threatening and several times I have been admitted to the hospital for emergency treatment of asthma attacks brought on by fumes from R.D. Mac's operation." Affidavit of Debra O'Rourke, 1-2.

Intervenor contends that petitioner has not demonstrated that operation of the temporary asphalt plant under modified condition 2 will result in probable injury, for purposes of the fifth irreparable injury question set out above. According to intervenor, the existing, smaller asphalt plant on the site has operated for four years without any time restrictions, including operations at all hours of the day and night. Under modified condition 2, the two asphalt plants cannot operate at the same time, intervenor argues, which means that petitioner's concerns regarding the quadrupling of impacts are exaggerated. Intervenor further argues that the proposed new asphalt plant is a newer plant with better emissions controls than the old plant, and that it meets the most current emissions regulations.

In addition, intervenor argues that petitioner does not live at the adjoining residence, and that it is mere speculation that her current rental will be sold and she will choose to move back to her house while the temporary asphalt plant is in operation, rather than seek another rental. In addition, intervenor argues that the adjoining house was awarded to petitioner's ex-husband as part of a divorce decree, and that petitioner apparently bought the house from her ex-husband approximately three years ago, after the existing asphalt plant went into operation. Intervenor questions whether petitioner's decision to purchase a house in proximity to a known quarry and existing asphalt plant is consistent with claims of a life-threatening asthma condition. Finally, intervenor notes that the proposed new asphalt plant is mobile, and can easily be removed if the county's decision is overturned on appeal. Intervenor argues that any injury cannot be "irreparable" if the use allowed by the decision can be so easily halted and removed.

While it is a close call, we agree with intervenor that petitioner has not demonstrated that operation of the new temporary asphalt plant will cause probable injury to petitioner, rather than one that is merely threatened or feared. While the existing asphalt plant apparently aggravated petitioner's asthma when she lived at the house, at present she does not reside there, and the possibility that her current rental will be sold and that she will choose to move back to her house is at this time simply a possibility. In addition, under modified condition 2 the existing and proposed asphalt plants will not operate at the same time. Petitioner does not dispute that the existing plant could lawfully operate at all hours, although operation at night was apparently not "typical," so with respect to hours of operation the new plant approved by this decision does no more than replace the existing plant. While the new plant apparently has more capacity than the existing one, intervenor argues and petitioner does not dispute that the new plant has better emissions controls than the old plant. It is possible that emissions from the new plant would not exceed those of the old one, in which case it is difficult to understand how emissions from the asphalt plant approved by this decision will cause petitioner irreversible harm if not stayed.

For these reasons, petitioner's motion for stay is denied. However, we give petitioner leave to file a new motion for stay in the event petitioner loses her current rental and moves back to the adjoining residence. While we cannot say that that circumstance, if it transpires, would necessarily warrant granting a stay under the facts as we understand them, we believe it may present a stronger case for a stay.

SCHEDULE

The county filed the record in this appeal on May 2, 2007, which means the petition for review is presently due on May 23, 2007, if no record objections are filed. Even though no stay of the challenged decision is granted, it seems to the Board that both petitioner and intervenor have a strong interest in expediting these appeal proceedings. The Board encourages the parties to work together to resolve any record objections. If the parties wish

to expedite the briefing or oral argument schedule, the Board is willing to accommodate any stipulated requests.

Dated this 8th day of May, 2007.

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Tod A. Bassham
Board Member