

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

3  
4                                   NEIGHBORS FOR SMART GROWTH,  
5                                   and JAKE MINTZ,  
6                                   *Petitioners,*

7  
8                                   vs.

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10                                  WASHINGTON COUNTY,  
11                                  *Respondent,*

12  
13                                  and

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15                                  LENNAR NORTHWEST, INC.,  
16                                  *Intervenor-Respondent.*

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18                                  LUBA No. 2016-122

19  
20                                  ORDER

21   **MOTION TO INTERVENE**

22                   Lennar Northwest, Inc., the applicant below, moves to intervene on the  
23 side of respondent. There is no opposition to the motion, and it is allowed.

24   **MOTION TO DISMISS**

25                   The notice of intent to appeal in this appeal was timely filed by certified  
26 mail on December 13, 2016. Petitioner Mintz, who is not an active member of  
27 the Oregon State Bar, signed that notice of intent to appeal on his own behalf  
28 and on behalf of Neighbors for Smart Growth, an organization. While  
29 individuals may represent themselves at LUBA, under OAR 661-010-0075(6),  
30 an organization must be represented by an attorney who is an active member of

1 the Oregon State Bar. LUBA thereafter issued an order that stated in relevant  
2 part:

3 “\* \* \* Petitioner Jake Mintz, who signed the December 13, 2016  
4 notice of intent to appeal on behalf of both petitioners, is not an  
5 attorney. Petitioners shall have *seven days from the date of this*  
6 *order to file* an amended notice of intent to appeal, signed by an  
7 active member of the Oregon State Bar, indicating that petitioner  
8 Neighbors for Smart Growth is represented by an attorney. [OAR  
9 661-010-0075(6).] In the event an amended notice of intent to  
10 appeal is not filed on or before that date, in accordance with OAR  
11 661-010-0075(6), petitioner Neighbors for Smart Growth will be  
12 dismissed from this appeal.[<sup>1</sup>]

13 “Dated this 15<sup>th</sup> day of December, 2016.” (Emphasis added.)

14 Petitioners filed an Amended Notice of Intent to Appeal, signed by both  
15 petitioner Mintz and an attorney on behalf of petitioner Neighbors for Smart  
16 Growth. That Amended Notice of Intent to Appeal was filed by certified mail  
17 on December 23, 2016, eight days after December 15, 2016.

18 The county and intervenor-respondent (respondents) move to dismiss  
19 petitioner Neighbors for Smart Growth, because the amended notice of intent to

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<sup>1</sup> OAR 661-010-0075(6) provides, in relevant part:

“\* \* \* In the event someone other than an active member of the Oregon State Bar files a notice of intent to appeal on behalf of a corporation, other organization, or another individual, the individual filing the notice of intent to appeal will be given an opportunity to provide an amended notice of intent to appeal that conforms with this section. *If an amended notice of intent to appeal is not filed within the time set by the Board, the Board will dismiss the appeal.*” (Emphasis added.)

1 appeal was filed eight days after December 15, 2016, and while OAR 661-010-  
2 0005 provides that LUBA may overlook technical violations of its rules that do  
3 not affect the substantial rights of parties, that same rule provides in part that  
4 “[f]ailure to comply with the time limit for filing a notice of intent to appeal  
5 under OAR 661-010-0015(1)” is not a mere technical violation of LUBA’s  
6 rules.<sup>2</sup> *Waluga Neighborhood Association v. City of Lake Oswego*, 59 Or  
7 LUBA 380, 382-83 (2009).

8 It is clear that if the initial notice of intent to appeal that was timely filed  
9 on December 13, 2016 had been filed one day late, under OAR 661-010-  
10 0015(1)(a) this appeal would have to be dismissed, and the last sentence of  
11 OAR 661-010-0005 would preclude treating such a failure as a mere technical  
12 violation that could be overlooked if the substantial rights of the parties were

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<sup>2</sup> 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.*” (Emphasis added.)

1 not affected.<sup>3</sup> *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227, 231 (1994);  
2 *Oak Lodge Water District v. Clackamas County*, 18 Or LUBA 643, 644 (1990);  
3 *Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 613  
4 (1989). The parties dispute whether that sentence also applies to an *amended*  
5 notice of intent to appeal that was not filed prior to a deadline established in a  
6 LUBA order issued pursuant to OAR 661-010-0075(6). Respondents argue  
7 that it does apply, and since the date of the order was December 15, 2016 this  
8 appeal must be dismissed because it was filed one day late. Petitioners also  
9 assume the date of our order was December 15, 2016, but argue that since the  
10 last sentence of OAR 661-010-0005 does not refer to *amended* notices of intent  
11 to appeal, and does not refer to OAR 661-010-0075(6), the filing of the  
12 amended notice of intent to appeal one day late should be overlooked as a mere  
13 technical violation of LUBA’s order and OAR 661-010-0075(6) that did not  
14 prejudice any party’s substantial rights.

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<sup>3</sup> OAR 661-010-0015(1)(a) provides:

“The Notice [of Intent to Appeal], 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)–(5). A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. *A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.*” (Emphasis added.)

1           Although we agree with petitioners’ understanding of the last sentence of  
2 OAR 661-010-0005, *i.e.* that it is limited to the initial notice of intent to appeal  
3 and does not apply to *amended* notices of intent to appeal, we need not decide  
4 the question to resolve respondents’ motion to dismiss.

5           As noted earlier, the text of our order does state that it is “Dated this 15th  
6 day of December, 2016.” However, the order is date stamped: “12/16/16 AM  
7 9:40 LUBA.” And the Certificate of Mailing attached to the order states that  
8 the order was mailed to the parties “on December 16, 2016.” LUBA’s offices  
9 were closed on December 15, 2016, due to inclement weather. Apparently  
10 when the order was date stamped and mailed on December 16, 2016, LUBA  
11 failed to change the date stated in the text of the order to be consistent with the  
12 date stamp and certificate of mailing.

13           OAR 661-010-0070(1) provides:

14           **“Final Order of Board**

15           “(1) An Order of the Board is final when the cover page of the  
16           order containing the caption of the appeal:

17           “(a) States “Final Opinion and Order”;

18           “(b) Indicates whether the decision being reviewed is  
19           affirmed, reversed, remanded, or whether the appeal  
20           is dismissed;

21           “(c) *Contains the date of the final order; and*

22           “(d) *Is time and date stamped by the Board.*” (Emphases  
23           added.)

1           If our order in this case had been a final opinion, and had been dated  
2 December 15, 2016 in the text of the final opinion but was not date stamped  
3 and mailed to the parties until December 16, 2016, we have no doubt that the  
4 final opinion would be considered to be “final” and therefore dated the later  
5 date, December 16, 2016. We can think of no reason why there should be a  
6 different result for an interlocutory order. Because the order requiring  
7 petitioners to file an amended notice of intent to appeal within seven days of  
8 the date of the order was dated December 15, 2016 in the body of the order, but  
9 was date stamped and mailed to the parties one day later, on December 16,  
10 2016, we conclude the date of our order was December 16, 2016, not December  
11 15, 2016. The December 23, 2016 amend notice of intent to appeal was  
12 therefore timely filed. Respondents’ motion to dismiss is denied.

13           The county shall transmit the record in this appeal within 21 days from  
14 the date of this order.

15           Dated this 3<sup>rd</sup> day of February, 2017.

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Michael A. Holstun  
Board Chair