

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

3
4 JAMES J. NICITA,
5 *Petitioner,*

6
7 and

8
9 NORTHWEST ENVIRONMENTAL
10 DEFENSE CENTER and PATRICIA SPADY,
11 *Intervenors-Petitioners,*

12
13 vs.

14
15 CITY OF OREGON CITY,
16 *Respondent.*

17
18 LUBA Nos. 2020-037/039

19
20 ORDER

21 **BACKGROUND**

22 In these consolidated appeals, petitioner and intervenors-petitioners
23 (collectively, petitioners) challenge two city ordinances. LUBA No. 2020-037 is
24 an appeal of Ordinance 19-1015, updating the city’s stormwater and grading
25 design standards (design standards). LUBA No. 2020-039 is an appeal of
26 Ordinance 19-1014, adopting a stormwater master plan (master plan). Petitioner
27 Nicita filed the notice of intent to appeal (NITA) in both of these consolidated
28 appeals. Northwest Environmental Defense Center (NEDC) and Patricia Spady
29 (Spady) intervened on the side of petitioner in both appeals.

1 LUBA has received three petitions for review: one filed by petitioner
2 Nicita, one filed by NEDC, and one filed by Spady. The city has not yet filed a
3 response brief.

4 On December 15, 2020, the city filed a motion to suspend, bifurcate, and
5 dismiss these consolidated appeals. On December 18, 2020, the Board issued an
6 order suspending the appeals. On December 22, 2020, petitioners filed a joint
7 response opposing the city’s motion to bifurcate and dismiss these consolidated
8 appeals.

9 **MOTION TO BIFURCATE AND DISMISS**

10 **A. Motion to Dismiss LUBA No. 2020-037**

11 “A notice of intent to appeal plan and land use regulation amendments
12 processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on
13 or before the 21st day after the date the decision sought to be reviewed is mailed
14 to parties entitled to notice under ORS 197.615. A Notice filed thereafter shall
15 not be deemed timely filed, and the appeal shall be dismissed.” OAR 661-010-
16 0015(1)(a). The date of mailing is considered the filing date if the NITA “is
17 mailed by registered or certified mail, and the party filing the Notice has proof
18 from the post office of such mailing date.” OAR 661-010-0015(1)(b).¹ If a

¹ OAR 661-010-0015(1)(b) provides:

“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

1 petitioner mails a NITA via regular first class mail, the date of mailing is not the
2 file date; instead, the date that LUBA receives the NITA is the file date. *Id.*

3 The city argues that LUBA should dismiss LUBA No. 2020-037 because
4 the city argues that the NITA was not timely filed. The city filed the motion to
5 dismiss before transmitting the record. In its motion, the city states that “[n]otice
6 of the adoption of Ordinance 19-1015 was provided on March 9, 2020 and it was
7 final on that date.” Motion to Suspend, Bifurcate, and Dismiss 3. Petitioners do
8 not dispute that statement. Accordingly, we assume for purposes of this order
9 that, on March 9, 2020, the city mailed notice of the challenged decision to parties
10 entitled to notice. Thus, to perfect an appeal at LUBA, the NITA was required to
11 be filed no later than March 30, 2020. The city contends that petitioner’s NITA
12 was not mailed by registered or certified mail but instead was mailed by regular
13 mail and received by LUBA on April 1, 2020, citing LUBA’s April 2, 2020 order
14 on consolidation that states that the Board received petitioner’s NITA “by U.S.
15 postal mail on April 1, 2020.”

16 In response to the city’s motion to dismiss, petitioners submit an affidavit
17 explaining that, on March 30, 2020, petitioner Nicita’s former attorney mailed to
18 LUBA via certified mail the original NITA in LUBA No. 2020-037 and, that
19 same day, mailed a separate copy of the NITA to LUBA via regular first class

Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, the date of the receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number is the date of filing.”

1 mail. Petitioner’s former attorney also sent two copies of the NITA to the city
2 and the city’s attorney, one to each addressee via certified mail and one to each
3 addressee via regular first class mail.

4 On April 1, 2020, LUBA first received the copy of the NITA that petitioner
5 mailed to LUBA via regular first class mail. The next day, April 2, 2020, LUBA
6 received the original NITA that petitioner sent via certified mail on March 30,
7 2020. Petitioners submitted copies of the receipts stamped by the United States
8 Postal Service with a March 30, 2020 date and the certified or registered number
9 for parcels sent to LUBA, the city, and the city’s attorney. The city has not replied
10 with any contrary evidence or argument. Petitioners have established that the
11 NITA in LUBA No. 2020-037 was timely filed via certified mail on March 30,
12 2020.

13 The city’s motion to dismiss LUBA No. 2020-037 is denied.

14 **B. Motion to Dismiss LUBA No. 2020-039**

15 The city argues that LUBA should dismiss LUBA No. 2020-039 because
16 petitioner Nicita’s petition for review assigns error to the city’s decision
17 regarding the design standards challenged in LUBA No. 2020-037 but does not
18 assign any error to the city’s decision adopting the master plan challenged in
19 LUBA No. 2020-039. The city argues that Nicita effectively did not file a petition
20 for review in LUBA No. 2020-039 and that failure to file a petitioner for review
21 should result in dismissal. *See* OAR 661-010-0030(1) (providing that failure to
22 timely file a petition for review “shall result in dismissal of the appeal”).

1 The city acknowledges that Nicita’s petition for review adopts by reference
2 intervenor Spady’s first assignment of error, which does challenge the master
3 plan. However, the city argues that, together, Nicita’s and Spady’s briefs exceed
4 the applicable 11,000-word limit and, therefore, the adoption by reference is not
5 effective. OAR 661-010-0030(2)(b); *see STOP Tigard Oswego Project, LLC v.*
6 *City of West Linn*, 68 Or LUBA 539, 542-43 (2013) (adoption by reference is
7 permitted only so long as it does not cause the incorporating brief to exceed the
8 applicable length limit). The city argues that, without relying on Spady’s petition
9 for review, Nicita’s petition for review does not include independent arguments
10 assigning error to the master plan and that “[t]he failure to allege any error is
11 essentially the same as not filing a petition for review at all.” Motion to Suspend,
12 Bifurcate, and Dismiss 6.

13 Petitioners respond that Nicita’s petition for review assigns error to the
14 challenged master plan and does not exceed the word limit. We agree. Nicita’s
15 petition for review incorporates by reference Spady’s first assignment of error,
16 which the city acknowledges challenges the master plan. Nicita’s petition for
17 review includes a certificate of compliance with brief length requirements which
18 states that the word count is 6,192—4,808 words less than the applicable 11,000-
19 word limit in OAR 661-010-0030(2)(b). Nicita did not incorporate Spady’s entire
20 petition for review by reference into their petition for review; instead, Nicita
21 incorporated by reference Spady’s first assignment of error. According to
22 petitioners, Spady’s first assignment of error contains 4,744 words. Therefore,

1 Nicita’s petition for review contains 10,936 words, which is below the 11,000-
2 word limit. The incorporation by reference was therefore proper and effective.²

3 Moreover, even if Nicita did incorporate by reference Spady’s entire
4 petition for review, and thereby exceeded the applicable word limit without
5 obtaining prior permission from the Board for an overlength brief, the remedy
6 would be that LUBA would disregard, for purposes of Nicita’s brief, the portion
7 of the incorporated Spady brief that exceeds the word limit. LUBA would not
8 disregard the entire brief or treat it as effectively not filed. *See, e.g., Graser-*
9 *Lindsey v. City of Oregon City*, 72 Or LUBA 25, 29 (2015) (providing that, when
10 a party files a brief that exceeds the applicable word limit without obtaining
11 permission from the Board, the Board does not consider the arguments that
12 exceed the applicable word limit).

13 The city’s motion to dismiss LUBA No. 2020-039 is denied.

14 **C. Motion to Bifurcate**

15 We deny the city’s motions to dismiss both appeals. Accordingly, we also
16 reject the city’s motion to bifurcate the appeals.

² The parties dispute whether Nicita independently assigns error to the master plan in Nicita’s petition for review. We need not and do not resolve that dispute.

1 **BRIEFING SCHEDULE**

2 The appeal is reactivated. The city’s response briefs shall be due 21 days
3 after the date of this order. The Board will schedule oral argument by separate
4 letter.

5 Dated this 9th day of February 2021.

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11 H. M. Zamudio
 Board Member