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NATURE OF THE DECISION

Petitioner appeals a county decision denying petitioner’s local appeal of a middle housing development project approval.

MOTION TO TAKE EVIDENCE

As discussed later, the county filed a motion to dismiss the appeal as untimely filed. Petitioner filed a response opposing the motion to dismiss and a motion to take evidence, pursuant to ORS 197.835(2) and OAR 661-010-0045. The parties’ pleadings on the motion to dismiss present disputed factual allegations regarding when petitioner knew or should have known of the county’s final decision for purposes of determining whether petitioner’s Notice of Intent to Appeal (NITA) was timely filed. The evidence outside the record includes a declaration by petitioner’s attorney concerning the circumstances of the NITA filing and copies of communications between petitioner and the county. The county does not object to the motion to take evidence. The motion to take evidence is granted.

FACTS

The middle housing development project was initially approved by county staff. *See* ORS 197A.420 (defining “middle housing” and requiring that counties allow the development of middle housing on land zoned for residential use). On November 3, 2025, petitioner filed a local appeal of the middle housing approval. The county initially assigned an appeal number and scheduled an appeal hearing

1 for December 4, 2025. Petitioner's Response to Motion to Dismiss 2. However,
2 on November 12, 2025, county planning staff sent petitioner's attorney an email
3 stating that petitioner did not have standing to appeal the decision. The county
4 explained that petitioner did not have standing to appeal the middle housing
5 approval because it was approved under a Type I process where only the
6 applicant is entitled to a local appeal under the county code. On November 21,
7 2025, a county attorney returned a phone call from petitioner's attorney and
8 stated that the county would not be issuing anything further on the attempted local
9 appeal. Motion to Take Evidence Declaration 2. On November 24, 2025,
10 petitioner's attorney emailed county counsel stating that not issuing a formal final
11 decision denying the local appeal would be prejudicial to petitioner. *Id.* The
12 county did not respond to petitioner's attorney's email. *Id.*

13 On December 3, 2025, which was 21 days after the county sent petitioner's
14 attorney the email stating that petitioner did not have standing to pursue a local
15 appeal, petitioner attempted to file a NITA with LUBA challenging the denial of
16 a local appeal. Although the certificate of service for the NITA states that the
17 NITA was filed at LUBA's current address, in fact the NITA was mailed to our
18 previous address. On December 12, 2025, petitioner filed a "Corrected" NITA at
19 our current address, explaining that the original NITA was accidentally mailed to

1 our previous address.¹ The county subsequently moved to dismiss the appeal as
2 untimely filed.

3 **MOTION TO DISMISS**

4 A NITA must be filed with LUBA within 21 days of a challenged decision
5 becoming final. ORS 197.830(9); OAR 661-010-0015(1)(a). The county argues
6 that the decision became final on November 12, 2025, when the county emailed
7 petitioner’s attorney stating that petitioner did not have standing to pursue a local
8 appeal. According to the county, the NITA was required to be filed no later than
9 21 days after that November 12, 2025 email – December 3, 2025 – and because
10 the NITA was not filed until December 12, 2025, it is untimely and the appeal
11 must be dismissed.

12 Petitioner has essentially three arguments for why the NITA was timely
13 filed: (1) the November 12, 2025 email was not the final decision; (2) mailing the
14 NITA to our previous address is sufficient to file the NITA; and (3) failure to
15 mail the NITA to our correct address is only a technical violation that did not
16 prejudice the county’s substantial rights.

17 **A. The decision was final on November 12, 2025.**

18 ORS 197.830(3) provides in pertinent part:

19 “If a local government makes a land use decision without providing
20 a hearing * * * a person adversely affected by the decision may

¹ A Second and a Third Corrected NITA were also filed, but those pleadings are not relevant to our disposition of the appeal.

1 appeal the decision to the board under this section:

2 “(a) Within 21 days of actual notice where notice is required; or

3 “(b) Within 21 days of the date a person knew or should have
4 known of the decision where no notice is required.”

5 Petitioner does not argue that the county was required to provide petitioner
6 notice of the decision to deny a local appeal, so the NITA was required to be filed
7 within 21 days of when petitioner “knew or should have known of the
8 decision * * *.” The county argues that the decision was final on November 12,
9 2025, when the county sent petitioner’s attorney the email stating that no local
10 appeal was available, as petitioner received the email and therefore knew of the
11 decision. Differently, petitioner argues that the decision was final when the
12 county’s attorney told petitioner’s attorney during the November 21, 2025 phone
13 call that nothing further would be forthcoming from the county. The November
14 12, 2025 email stated:

15 “Staff has reviewed your appeal of [the middle housing approval]
16 with county counsel and have determined pursuant to the
17 Development Code Section 202-1.3 that you do not have standing
18 to appeal this Type I decision. The code section specifically notes
19 that appeals of Type I decisions are limited to the applicant.” Motion
20 to Take Evidence Not in the Record Declaration Ex 2.

21 Petitioner argues that it was not aware that the email was a final decision
22 denying a local appeal. According to petitioner, it assumed the email was an
23 informal communication and a formal denial would be forthcoming. Petitioner
24 asserts that an internal email from the county stated that they had no doubt that
25 petitioner would be responding shortly to the email denying the local appeal.

1 Petitioner's Response to Motion to Dismiss 2. According to petitioner, it did not
2 know that the November 12, 2025 email was final until the phone call with county
3 counsel explaining that the county would take no further action. Thus, according
4 to petitioner it did not know and could not have known that the decision was final
5 until November, 21, 2025, and the NITA was therefore timely.

6 Petitioner undisputedly knew of the decision on November 12, 2025, when
7 its attorney received the email. Petitioner attempts to delay the beginning of the
8 21-day clock for filing a NITA by asserting that subsequent clarifications of
9 earlier communications can delay the deadline for appealing the earlier
10 communication. Petitioner cites *Kent v. City of Portland*, 38 Or LUBA 942
11 (2000), *Komning v. Grant County*, 20 Or LUBA 481 (1990), and *Murphy Citizen*
12 *Advisory Com. v. Josephine County*, 319 Or 477, 878 P2d 414 (1994), for this
13 proposition.

14 Although the county does not respond to petitioner's citations, the cited
15 cases are of no assistance to petitioner. In *Kent*, the petitioners sought to
16 challenge the use of a city park as a soccer field. The petitioners argued to the
17 city that a conditional use permit was required for the use. The city commissioner
18 administering the parks bureau sent the petitioners a letter on June 7, 2000, stating
19 that an opinion had been requested from the Office of Planning and Development
20 Review (OPDR), which concluded that a conditional use permit was not required.
21 In response to inquiries from the petitioners, on June 14, 2000, the city forwarded
22 to the petitioners the May 10, 2000 opinion from OPDR stating that a conditional

1 use permit was not required. On June 28, 2000, petitioners appealed to LUBA the
2 June 7, 2000 letter from the commissioner. The city moved to dismiss the appeal
3 on the basis that the commissioner's letter was not a land use decision and that
4 petitioners should have appealed the May 10, 2000 OPDR decision instead. We
5 agreed with the city that the June 7, 2000 commissioner letter was not a land use
6 decision and that the May 10, 2000 OPDR opinion was the land use decision that
7 needed to be appealed. We further held, however, that because the appeal had
8 been filed within 21 days of when petitioner knew of the OPDR opinion that the
9 appeal of the clarification letter from the commissioner was sufficient to appeal
10 the OPDR land use decision. *Kent*, 38 Or LUBA at 947-48 (citing *Caraher v.*
11 *City of Klamath Falls*, 30 Or LUBA 204 (1995) (appeal of a clarification letter
12 was sufficient to appeal an earlier land use decision as the appeal was filed within
13 21 days of learning of the earlier land use decision)).

14 *Kent* did not extend the time for filing the NITA. The petitioners were still
15 required to file the NITA within 21 days of learning of the land use decision. *Kent*
16 merely held that appealing the follow-up clarification letter was sufficient to
17 appeal the underlying land use decision that the letter was clarifying – as long as
18 the NITA was filed within 21 days of learning of the underlying land use
19 decision. If petitioner in the current appeal had filed an appeal of the phone
20 conversation explaining that no further action would be required within 21 days
21 of the November 12, 2025 email denying a local appeal, then under *Kent*
22 petitioner could presumably still challenge the November 12, 2025 email. That is

1 not what occurred in this case. Petitioner appeals the November 12, 2025 email,
2 but the appeal was filed more than 21 days after petitioner learned of the email.

3 *Komning* is also of no assistance to petitioner. In *Komning*, the petitioners
4 appealed a decision allowing a dwelling for a park ranger in a park, on property
5 zoned exclusive farm use, and a denial of a local appeal. The planning
6 commission had approved the dwelling, and petitioners appealed that decision to
7 the county court.² After the planning commission decision had been appealed,
8 the county court determined that all of the county court commissioners had
9 abstained or disqualified themselves from hearing the appeal. County counsel
10 subsequently sent the petitioners a letter stating that the appeal was being
11 cancelled and the planning commission decision was now final. Within 21 days
12 of the county counsel's letter, petitioners appealed both the planning commission
13 decision and the county court's decision not to hear the appeal. *Komning*, 20 Or
14 LUBA at 486-87. The issue in *Komning* was not when the decision was final but
15 whether the petitioners had exhausted their administrative remedies. The 21-day
16 deadline for appealing the decisions began to run when the county counsel sent
17 the petitioners the letter cancelling the county court appeal. That letter is
18 equivalent to the November 12, 2025 email in the present case. Unlike in

² In Grant County, the county court was the final local decision maker – it was not a circuit court.

1 *Komning*, petitioner did not appeal within 21 days of receiving the challenged
2 decision.

3 *Murphy Citizens Advisory Com.* concerned whether a stipulation between
4 the county and the applicant to conditionally approve the application entered into
5 after the applicant had filed a mandamus action in circuit court was a land use
6 decision. We do not see that this has any relevance to the present situation.

7 None of the cases cited by petitioner provide any basis to extend the 21-
8 day deadline for appealing the county's November 12, 2025 email denying
9 petitioner's local appeal. Petitioner knew of the decision on November 12, 2025,
10 because its attorney received the email. Furthermore, despite petitioner's attempt
11 to recast what was the final decision in this appeal, the NITA clearly identified
12 the November 12, 2025 email as the final decision. Therefore, under ORS
13 197.830(3)(b), petitioner had until December 3, 2025, to file its NITA, absent
14 some other basis to extend or not enforce the 21-day deadline.³

³ Petitioner alternatively argues that the county might not even have made a final decision yet on the denial of its local appeal, and that the record is incomplete due to the omission of that final decision. However, the subject of petitioner's NITA is the November 12, 2025 email, and there does not seem to be any dispute that the November 12, 2025 email was sent to petitioner's attorney. Motion to Take Evidence Not in the Record Declaration Ex 2.

1 **B. Mailing the NITA to an incorrect address is insufficient to**
2 **establish timely filing.**

3 Petitioner argues that technically the NITA was timely filed under our
4 rules. OAR 661-010-0015(1)(b)(B) (Jan 15, 2025) provides that the date of filing
5 for a NITA is: “The date the Notice is mailed, provided it is mailed by registered
6 or certified mail[.]” According to petitioner, the NITA was mailed by registered
7 or certified mail on December 3, 2025 – 21 days from the November 12, 2025
8 email – so therefore the NITA is timely regardless of whether it was mailed to
9 LUBA’s current address.

10 We have consistently held that a NITA is considered filed on the date it is
11 mailed by certified mail to LUBA, “if it placed in an envelope that is addressed
12 to LUBA at the address set forth in LUBA’s rules and mailed to that address.”
13 *Bartlett v. City of Portland*, 72 Or LUBA 408, 410 (2015), *aff’d*, 276 Or App
14 919, 370 P3d 565 (2016); *Shepherd v. Yamhill County*, 75 Or LUBA 361, 363
15 (2017) (same); *Ford v. Jackson County*, 50 Or LUBA 359, 363 (2005)
16 (dismissing appeal as untimely because NITA was sent to a third party rather than
17 LUBA). Similarly, we have held that a petition for review is filed on the date that
18 it is mailed to LUBA only if it is placed in an envelope that is addressed to LUBA
19 at the address set forth in LUBA’s rules and mailed to that address. *See Kennon*
20 *v. City of Union*, LUBA No 2024-095 (Mar 25, 2025) (dismissing an appeal for
21 a late-filed petition for review that was incorrectly mailed to LUBA’s former
22 address); *Conte v. City of Eugene*, LUBA No 2024-096 (Mar 19, 2025) (same);
23 *see also Central Oregon Landwatch v. Jefferson County*, LUBA No 2025-023

1 (June 25, 2025) (denying motion to intervene as untimely because motion to
2 intervene was mailed to LUBA's former address) (slip order at 3). A petitioner
3 must mail the NITA to our current address for the NITA to be considered filed
4 on the date of mailing – mailing the NITA to our former address (or under
5 petitioner's reasoning anywhere in the world) is not sufficient to achieve filing
6 on the date of mailing.

7 Petitioner argues that *Bartlett* is distinguishable because in *Bartlett* the
8 city's decision stated that an appeal of the decision must be appealed to LUBA
9 at a specific address. According to petitioner, because the county's email did not
10 identify a specific LUBA address for any appeal, petitioner was not required to
11 mail the NITA to our current address. The fact that the final decision in the
12 present appeal did not specify an address to appeal the decision to LUBA is a
13 distinction without a difference. Petitioner points to nothing in the statutes or our
14 rules that makes filing of the NITA to the correct address dependent upon
15 whether the address is provided in the final decision.

16 Petitioner also attempts to distinguish *Bartlett* because it relies on *Ford*, in
17 which the petitioner mailed the NITA to a third party rather than LUBA.
18 According to petitioner, under *Ford* a NITA should only be deemed untimely if
19 it was mailed to someone besides LUBA. Again, petitioner relies on a distinction
20 without a difference. All of our cases make clear that in order for a NITA to rely
21 on the date of mailing to be timely, the NITA must be mailed to LUBA at
22 LUBA's correct address. *See former* OAR 661-010-0075(7) (Jan 15, 2025),

1 *renumbered as* OAR 661-010-0014(6) (Jan 1, 2026) (setting out LUBA’s
2 address). Neither *Bartlett* nor *Ford* are distinguishable.

3 **C. Untimely filing is not a technical violation.**

4 Petitioner argues that even if the NITA was untimely filed that is merely a
5 technical violation of LUBA’s rules, and absent any showing of prejudice to the
6 county the error is harmless and should not result in dismissal. Petitioner’s
7 argument is directly contrary to our rules. OAR 661-010-0005 (Jan 15, 2025)
8 provides in pertinent part:

9 “Technical violations not affecting the substantial rights of the
10 parties shall not interfere with the review of a land use decision or
11 limited land use decision. *Failure to comply with the time limit for*
12 *filing a notice of intent to appeal under OAR 661-010-0015(1) or a*
13 *petition for review under OAR 661-010-0030(1) is not a technical*
14 *violation.”* (Emphases added.)

15 Regardless of whether there is any prejudice to a party’s substantial rights,
16 the failure to comply with the time limit for filing the NITA is not a technical
17 violation and dismissal is required. *See Shepherd*, 75 Or LUBA at 362 (“Under
18 OAR 661-010-0005, failure to comply with the deadline for filing a notice of
19 intent to appeal ‘is not a technical violation’ that LUBA may overlook, even if
20 overlooking the failure would not prejudice any other party’s substantial
21 rights.”).

22 Petitioner cites *Tice v. Josephine County*, 21 Or LUBA 550 (1991), for the
23 proposition that a “procedural error in a NITA does not require dismissal of an
24 appeal absent a showing of prejudice to the substantial rights of a party.”

1 Response to Motion to Dismiss 8. Petitioner then asserts that there is no prejudice
2 to the county's substantial rights, and therefore under *Tice* the appeal should not
3 be dismissed. Although the county does not respond to this argument, petitioner
4 mischaracterizes *Tice*. In *Tice*, there was no dispute that the NITA was timely
5 filed. The issue was whether the failure to timely serve the NITA on the other
6 parties to the appeal should result in dismissal. Because *service* of the NITA on
7 other parties, as opposed to *filing* the NITA with LUBA, is a technical violation,
8 absent a showing of prejudice to a party's substantial rights, dismissal was not
9 warranted. *Id.* at 552. *Tice* does not stand for the proposition that petitioner claims
10 it does.

11 Finally, petitioner argues that the county's motion to dismiss is untimely
12 under OAR 661-010-0065(2) as it was filed more than 14 days after the county
13 learned of the alleged noncompliance. Petitioner states that the motion is
14 untimely and cites OAR 661-010-0065(2), which petitioner believes stands for
15 the proposition that the "motion to dismiss [fails] to comply with LUBA rules
16 [that motions] must be filed within 14 days [from] when the movant learns of the
17 alleged non-compliance." Response to Motion to Dismiss 8-9 (internal
18 parentheses omitted). Although the county again does not respond to petitioner's
19 argument, petitioner's argument is at odds with our rules, as the full text of OAR
20 661-010-0065(2) provides:

21 "Time of Filing: A party seeking to challenge the failure of an
22 opposing party to comply with any of the requirements of statutes
23 or Board rules shall make the challenge by motion filed with the

1 Board and served on all parties within 14 days after the moving party
2 obtains knowledge of such alleged failure. *However, motions to*
3 *dismiss for lack of jurisdiction may be filed at any time.* An opposing
4 party may, within 14 days from the date of service of a motion, file
5 a response, except as allowed by OAR 661-010- 0040(5)(d)(B) for
6 responses to motions for in-person oral argument.” (Emphasis
7 added.)

8 A motion to dismiss based on failure to timely file the NITA is a motion
9 to dismiss for lack of jurisdiction. The county’s motion to dismiss was not
10 untimely.

11 **D. Conclusion**

12 The challenged decision is the November 12, 2025 email from the county
13 to petitioner’s attorney stating that petitioner is not entitled to a local appeal. As
14 the first NITA was addressed to our previous address, it was not filed until
15 December 12, 2025, when it was mailed to our correct address. Mailing the NITA
16 to our correct address is necessary to file the NITA, and the failure to comply
17 with the 21-day deadline is not a technical violation. Therefore, the NITA was
18 not timely filed.

19 The appeal is dismissed.