BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER STOLOFF,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

ROGER W. HALLIN, LOLA A. HALLIN
and DUNTHORPE RIVERDALE
SERVICE DISTRICT,
Intervenors-Respondent.

LUBA No. 2005-136

ORDER ON MOTION TO DISMISS

The city moves to dismiss this appeal of subdivision approval based upon the allegation that Multnomah County (county) rather than the City of Portland (city) is the governing body and that petitioner named the wrong respondent in its notice of intent to appeal (NITA).[1]

The subject property is located in unincorporated Multnomah County but within the city's urban services boundary in what is known as an "urban pocket." Pursuant to an intergovernmental agreement (IGA) between the city and county, the county has delegated authority over certain quasi-judicial decisions, including subdivision approval, to the city in these urban pockets. Consequently, the application was filed on city application forms, the city processed the application, city staff prepared a staff report, the city held a public hearing, and the city hearings officer issued a

[1] Petitioner requests a telephone hearing, but we do not believe a hearing is necessary to resolve the matter. Petitioner also moves to strike the city's reply to his response to the motion to dismiss. While our rules do not specifically allow for replies involving motions, our practice is to allow replies where they are limited to new issues raised in a response. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000). The reply is limited to new issues. Therefore, petitioner's motion to strike is denied.

final decision on city letterhead. Petitioner appealed the city hearings officer's decision to LUBA on September 14, 2005. The city filed the record on October 18, 2005. On October 27, 2005, the city moved to dismiss this appeal, arguing that the county rather than the city is the proper respondent. According to the city, because petitioner failed to file a NITA naming the correct "governing body" within 21 days of the date the decision became final, this appeal must be dismissed as untimely.

The city's argument is based on the IGA, adopted in 2002, which delegates authority to the city to perform certain actions with respect to land use matters in identified urban pockets. Ordinance 967, which authorizes the county to enter into the IGA, states in relevant part:

> "The [Multnomah] Board of County Commissioners hereby directs the staff to move forward to develop an Intergovernmental Agreement to transfer quasi-judicial authority in accordance with this ordinance, but not legislative authority for future code revisions and amendments to these documents."

According to the city, the county remains the "governing body" as that term is used in LUBA's rules for all decisions the city makes under the IGA, and therefore the NITA must name the county as respondent, pursuant to OAR 661-010-0015(3)(a) and (f)(B). The city argues that under the ordinance and IGA the city hearings officer is merely performing the same function as a county hearings officer:

> "* * * the county has only delegated the functions of implementing and administering the county's codes in the urban pockets to the city. The effect of an IGA 'transferring implementation and administration of comprehensive plan and zoning regulations' to the city does only that; it does not give land use jurisdiction over the urban pockets to the city and it does not make the city the governing body for those properties. The city staff and hearings officer, by processing applications and rendering decisions in the urban pockets, are simply acting as agents of the county." Motion to Dismiss 8.

The city asks that we take official notice of the ordinance and the IGA, pursuant to Oregon Evidence Code (OEC) 202(7), which provides that official notice may be taken of:

"An ordinance, comprehensive plan or enactment of any county or incorporated city in this state * * *." Petitioner opposes that request with respect to the IGA, arguing that it is not an ordinance,

comprehensive plan or enactment of the county subject to official notice. We disagree. The IGA is an official enactment of the city and county, that acts to define the substantive law and procedures that apply to land use applications within identified urban pockets. We see no reason why the IGA is not properly viewed as an "enactment" subject to official notice. *See OCAPA v. City of Mosier*, 44 Or LUBA 452, 461 (2003) (taking official notice of an urban growth area joint management agreement between the city and county). We take official notice of the ordinance and IGA.[2]

Contrary to the city's arguments, the IGA does more than merely authorize the city to act as a hearings officer for the county. The IGA grants a broad delegation of authority related to land use planning and zoning for certain areas. The IGA provides:

> "The County agrees to delegate to the City any and all authority that it possesses and which is needed by the City to carry out land use planning and zoning implementation for the Affected Areas. * * * This delegation of authority should be construed broadly." IGA Section II.

Specifically, the IGA delegates to the city specific functions including processing land use cases, conducting hearings, and making land use decisions. IGA Section III(C). Further, if decisions that are rendered by the city under the IGA are appealed, the city responsible for representing the county before LUBA and the appellate courts. IGA Section III.A.5 and III.C.4.a.[3]

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[2] In any case, even if we could not take official notice of the IGA under OEC 202(7), we have held that we may consider documents not in the record nor subject to official notice for the limited purpose of determining our jurisdiction. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634, 643 n 4, *aff'd* 156 Or App 518, 972 P2d 1229 (1998); *Mazeski v. Wasco County*, 31 Or LUBA 126, 128 (1996).

[3] IGA Section III.A.5 states:

> "The City, through the City Attorney's Office, will represent the County in appeals to the Land Use Board of Appeals, Court of Appeals and Supreme Court of land use decisions made by the City for the Affected Area, as described in Section III.C.4. The County agrees to pay to the City Attorney's Office its fully burdened hourly rate for its work in representing the County before [LUBA and the courts]. * * *"

IGA Section III.C.4.a lists among the city's responsibilities under the IGA:

> "[The City shall r]epresent the County at the Land Use Board of Appeals, Court of Appeals and Oregon Supreme Court for any appeal of a land use decision made by the City for property in the Affected Area at the expense of the County, as provided in Section III.A.5."

Pursuant to that delegation the city, in its own name, processed the application, conducted a pre-application conference, issued a staff report, issued multiple notices, held a public hearing, and made a land use decision. As far as we are advised, at no point during the proceedings below did the city inform the parties that it considered the county to be the pertinent "governing body" in this matter, for purposes of appealing the hearings officer's decision to LUBA. Further, the city filed the record on appeal and, but for the present motion, presumably would be prepared to file briefs to defend its decision and otherwise assume the role of respondent in the present appeal, pursuant to IGA Section III.A.5 and III.C.4.a.

The city emphasizes that the ordinance and IGA reserve to the county the *legislative* authority to adopt a comprehensive plan or zoning code for the urban pockets and the authority to make final land use decisions where the governing body, rather than a lower body, is required to make the decision. While that is correct, there is no dispute that the challenged decision is a quasi-judicial decision made by a hearings officer, not a legislative action or a decision that must be made by the governing body. For such quasi-judicial land use decisions, the IGA essentially delegates all functions to the city. As far as we can tell, the county's only role under the IGA when a city decision is appealed is to pay the city's legal expenses.

As the city notes, OAR 661-010-0015(3)(a) requires that the NITA include a caption with the "name of the governing body, identifying the governing body as respondent." OAR 661-010-0015(3)(f)(B) requires that the NITA include the name and telephone number of the "governing body and the governing body's legal counsel." These requirements serve important purposes, but they are not in themselves jurisdictional requirements. The main purpose of these requirements is to notify LUBA and the governmental entity that made the challenged decision that the decision has been appealed, so that the governmental entity can take appropriate steps, such as preparing the record or perhaps making an appearance before LUBA to challenge the NITA. Because the city compiled the local record, made the challenged decision, and is the governmental entity responsible for defending the decision before LUBA, as far as our rules are concerned OAR 661-010-

0015(3)(a) and 661-010-0015(3)(f)(B) are far better served by naming the city rather than the county as respondent.

There may be some reason or authority extrinsic to our rules as to why the county rather than the city must be named as the respondent. If so, the city has not pointed it out to us. We do not understand the IGA to require that the county be named as respondent before LUBA. On the contrary, Sections III.A.5 and III.C.4.a of the IGA appear to assign that role to the city.[4]

Finally, even if we assume that the IGA or some other authority requires the county to be named as respondent, the city does not explain why petitioner's failure to name the county as respondent in the NITA requires dismissal of this appeal. Nothing in our rules states that an otherwise timely NITA is untimely because it fails to name the correct respondent and is not corrected within the 21-day filing period. We have consistently treated failures to satisfy the NITA *content* requirements under OAR 661-010-0015(3) as technical violations of our rules that do not interfere with our review, absent a showing of prejudice to the parties' substantial rights. OAR 661-010-0005.[5] *See, e.g., Markham v. Coos County*, 31 Or LUBA 529 (1996) (failure of

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[4] The city's motion to dismiss does not address IGA Sections III.A.5 or III.C.4, and its reply only briefly refers to those provisions. Nonetheless, we understand the city to argue that when the city "represents" the county before LUBA on appeal of the city's decision under the IGA it is acting not as the "respondent" or "governing body" but merely as a simple agent on the county's behalf, which remains the principal ultimately responsible for performance of the respondent's duties before LUBA. While Sections III.A.5 and III.C.4.a might be read in that way, it seems more consistent with the text and purpose of the IGA to understand those sections as a complete delegation of the county's role as respondent before LUBA to the city, for appeals of land use decisions the city makes under the IGA. As far as we can tell, the IGA assigns no role to the county in an appeal of a city decision to LUBA under the IGA. It is worth noting that the county has not appeared in this review proceeding or asked that it be substituted for the city. Further, ORS 190.030(1), which governs intergovernmental agreements, provides in relevant part that the governmental entity that is designated to perform specific functions and activities "is vested with all powers, rights and duties relating to those functions and activities that are vested by law in each separate party to the agreement[.]" That would suggest that having been delegated the task of "representing" the county before LUBA, the city has also assumed all other "powers, rights and duties" vested in the county associated with that representation, including the duty of acting as the respondent.

[5] 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

NITA to provide required information not basis to dismiss appeal, absent showing of prejudice); *Davenport v. City of Tigard*, 23 Or LUBA 679 (1992) (same). Where no such prejudice is shown, we have allowed NITAs to be amended to provide the information required by OAR 661-010-0015, or required the caption to be amended to name the correct parties. *Id.*; *see also Multnomah County v. Multnomah County*, ___ Or LUBA ___ (LUBA No. 2003-175, Order), November 21, 2003 (amending caption to reflect correct respondent).

In the present case, the city does not argue that naming the city rather than county as respondent affected its substantial rights, or the county's, for that matter. Even under the city's view of its role under the IGA, the city is responsible for preparing the record, and otherwise acting as the respondent before LUBA. Under these circumstances, it is difficult to see how the city or anyone else could be prejudiced by filing a NITA that names the city as respondent. Consequently, even if there is some reason or authority outside our rules that would require the NITA to list the county as respondent, we would almost certainly allow the NITA to be amended.[6]

The city's motion to dismiss is denied.[7]

In an earlier order, we suspended further events in this review proceeding until the city's motion to dismiss is resolved. Accordingly, the petition for review is due 21 days, the response briefs 42 days, and the final order and opinion 77 days from the date of this order.

> 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."

[6] We do not wish to foreclose the city or other parties from citing us to some legal authority that would require the NITA to name the county as respondent. As noted, in that event we would almost certainly allow petitioner to amend the NITA rather than dismiss this appeal, unless prejudice to some party's substantial rights is demonstrated. If the city or other parties submit further motions or pleadings on this issue, the movant should include arguments addressing whether LUBA should or should not allow the NITA to be amended under OAR 661-010-0005.

[7] Petitioner moves for an award of attorney fees pursuant to ORS 197.830(15)(b). However, attorney fees are awarded under that statute only if "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause (*i.e.*, merit)." *Fechtig v. City of Albany (A97764)*, 150 Or App 10, 24, 946 P2d 280 (1997). Petitioner's motion is at least premature, for this appeal is not over yet, and the parties have not presented all their arguments.

Dated this 11th day of January, 2006.

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Tod A. Bassham
Board Member