

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

3  
4 JOHN FREWING,  
5 *Petitioner,*

6  
7 vs.

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9 CITY OF TIGARD,  
10 *Respondent,*

11  
12 and

13  
14 WINDWOOD CONSTRUCTION,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2006-065

18 ORDER

19 **MOTION TO INTERVENE**

20 Windwood Construction (intervenor), the applicant below, moves to intervene on the  
21 side of respondent. There is no opposition to the motion, and it is allowed.

22 **MOTION TO DISMISS**

23 The challenged decision is on remand from this Board. *Frewing v. City of Tigard*, 50  
24 Or LUBA 226 (2005) (*Frewing II*). In *Frewing II*, we denied all but one part of an  
25 assignment of error directed at a subdivision and planned development approval, and  
26 remanded with instructions for the city to either (1) explain why it was not possible to  
27 preserve 25 trees or (2) amend the tree plan to preserve those trees. On remand, the city  
28 amended the tree plan to preserve the specified trees, and re-approved the subdivision and  
29 planned development proposal with that amended tree plan.

30 Intervenor moves to dismiss the appeal of the city's decision on remand, arguing that  
31 in light of the limited scope of remand, petitioner has no reasonable basis to appeal.  
32 Intervenor moves for attorney fees against petitioner, pursuant to ORS 197.830(15)(b), which  
33 allows the prevailing party to recover attorney fees against any party that presents a position

1 without probable cause to believe the position was well-founded in law or on factually  
2 supported information. In addition, intervenor argues that petitioner failed to serve a copy of  
3 the notice of intent to appeal on all parties entitled to such service, as required by OAR 661-  
4 010-0015(2), and that service of the notice of intent to appeal is a jurisdictional requirement.

5 Petitioner responds that notwithstanding the limited scope of remand and the limited  
6 nature of the city's decision, there are in fact reasonable bases for appeal, bases that will be  
7 set forth in the petition for review at an appropriate stage of this appeal.<sup>1</sup> With respect to  
8 service, petitioner states that while he served the notice on intervenor and the city, it appears  
9 that he failed to serve other persons who were entitled to notice under OAR 661-010-  
10 0015(2). On discovering the oversight, petitioner served copies of the notice of intent to  
11 appeal on those persons, and filed a "Supplemental Notice of Service" with LUBA.  
12 Petitioner argues that intervenor had not demonstrated that belated service on parties other  
13 than intervenor has prejudiced intervenor's substantial rights, and therefore such belated  
14 service is not a basis to dismiss this appeal or otherwise interfere with the Board's review.  
15 OAR 661-010-0005.<sup>2</sup>

16 The record has not yet been filed in this appeal, and it is far too early to determine

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<sup>1</sup> Petitioner's response does not comply with the requirements of OAR 661-010-0075(13) and OAR 660-010-0030(2) in several respects. Those requirements, in particular the double spacing requirement, were adopted to make documents filed with the Board more readable. Stated differently, documents that deviate significantly from those requirements are more difficult to read. We urge the parties to ensure that all future documents comply with the requirements of OAR 661-010-0075(13) and OAR 660-010-0030(2). The Board will strike on its own motion any future documents that do not comply with the double spacing requirement at OAR 661-010-0030(2)(e).

<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."

1 whether or not petitioner can advance a meritorious challenge to the city's decision on  
2 remand, no matter how limited was the basis for that remand. Even if petitioner is ultimately  
3 unable to do so, we would affirm the city's decision, not dismiss this appeal, as intervenor  
4 urges. Intervenor has not demonstrated that the challenged decision is not a land use or  
5 limited land use decision subject to our jurisdiction, or that the decision falls within some  
6 exception to our jurisdiction.

7 With respect to service of the notice, we agree with petitioner that belated service of  
8 the notice is a technical violation of our rules that will not interfere with this review  
9 proceeding, absent a showing of prejudice to a party's substantial rights. *Mountain West*  
10 *Investment v. City of Silverton*, 38 Or LUBA 932, 933 (2000); *see also Friends of the*  
11 *Metolius v. Jefferson County*, 50 Or LUBA 735, 739 (2005) (timely service of the notice of  
12 intent to appeal is not a jurisdictional requirement). Intervenor has not attempted to  
13 demonstrate that belated service to persons other than intervenor has prejudiced intervenor's  
14 substantial rights.

15 The motion to dismiss is denied. Intervenor's motion for attorney fees under  
16 ORS 197.830(15)(b) is denied as premature.

17 Dated this 10th day of May, 2006.

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Tod A. Bassham  
Board Chair