

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

3
4 1000 FRIENDS OF OREGON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF NORTH PLAINS,
10 *Respondent.*

11
12 LUBA No. 2024-044

13
14 ORDER

15 On September 18, 2023, the city adopted Ordinance No. 489, an ordinance
16 amending the city’s comprehensive plan to adopt an updated Housing Needs
17 Analysis (Housing Needs Analysis Ordinance).¹ On July 16, 2024, 1000 Friends
18 of Oregon (1000 Friends) and Nellie McAdams (McAdams) (together,
19 petitioners) filed a notice of intent to appeal (NITA) the Housing Needs Analysis
20 Ordinance. The NITA states that the city provided notice of the Housing Needs
21 Analysis Ordinance to petitioners on June 25, 2024.

22 On August 9, 2024, the city filed a motion to dismiss (Motion to Dismiss)
23 this appeal on the basis that it was not filed within the time required in ORS

¹ Ordinance No. 489 was processed as planning file number CPA 23-056(2). On the same date that the city adopted the Housing Needs Analysis Ordinance, the city adopted another ordinance, Ordinance No. 490, which adopted an amendment to the city’s urban growth boundary (UGB). *See* Motion to Dismiss 2. Ordinance No. 490 was processed as planning file number CPA 23-056(1). We refer to Ordinance No. 490 below as the UGB Ordinance.

1 197.830(9) and OAR 661-010-0015(1)(a), LUBA’s rule implementing the
2 statute.² On August 23, 2024, petitioners filed a response to the city’s motion to
3 dismiss that was accompanied by declarations in support of the NITA
4 (Response).³ On September 3, 2024, the city filed a Request to File a Reply in
5 Support of Motion to Dismiss and a Reply to Petitioners’ Response (Reply). On
6 September 11, 2024, petitioners filed a Motion for Leave to File a Sur-Reply to
7 the Motion to Dismiss, a Sur-Reply to the Motion to Dismiss, and a Corrected
8 Second Declaration of Andrew Mulkey in Support of the NITA. We refer to all
9 of those pleadings as Petitioners’ Sur-Reply.⁴

10 On September 17, 2024, we issued an order notifying the parties that
11 LUBA will not consider any further pleadings that either of the parties file
12 regarding the pending motion to dismiss unless permission to file any such
13 additional pleadings is granted by LUBA before the pleadings are filed. After that
14 order was issued and without prior permission from LUBA, petitioners filed
15 additional pleadings regarding the pending motion to dismiss on September 24,

² On August 14, 2024, the city filed a stipulated motion to suspend the deadline for filing the record pending our resolution of the motion to dismiss. On August 21, 2024, we issued an order suspending the deadline to file the record.

³ On August 26, 2024, petitioners filed a “Notice of Correction to Petitioners[’] Response to Respondent’s Motion to Dismiss” and a “Motion to Accept Petitioners’ Response to Respondent’s Motion to Dismiss.”

⁴ On September 13, 2024, the city filed an Objection to Petitioners’ Sur-Reply. We allow Petitioners’ Sur-Reply.

1 2024, and again on October 8, 2024. We refer to those pleadings as the
2 Unauthorized Pleadings.⁵ In accordance with our September 17, 2024, order, we
3 have not considered the Unauthorized Pleadings.

4 **JURISDICTION**

5 ORS 197.830(9) provides, in part, that

6 “[a] notice of intent to appeal a land use decision or limited land use
7 decision shall be filed not later than 21 days after the date the
8 decision sought to be reviewed becomes final. *A notice of intent to*
9 *appeal plan and land use regulation amendments processed*
10 *pursuant to ORS 197.610 to 197.625 shall be filed not later than 21*
11 *days after notice of the decision sought to be reviewed is mailed or*
12 *otherwise submitted to parties entitled to notice under ORS 197.615.*
13 Failure to include a statement identifying when, how and to whom
14 notice was provided under ORS 197.615 does not render the notice
15 defective.”⁶ (Emphasis added.)

⁵ The October 8, 2024, pleading also fails to comply with OAR 661-010-0065(3), which provides in relevant part that “[a]ll motions must be filed as a separate document and shall not be included with any other filing.” The October 8, 2024, pleading included four motions in one combined pleading. For that additional reason, we have not considered the October 8, 2024, pleading.

⁶ OAR 661-010-0015(1)(a) implements ORS 197.830(9) and provides that a NITA

“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 N[ITA] filed

1 ORS 197.615(4) in turn requires that:

2 “On the same day the local government submits the decision to the
3 director [of the Department of Land Conservation and
4 Development], the local government *shall mail, or otherwise*
5 *deliver*, notice to persons that:

6 “(a) Participated in the local government proceedings that led to
7 the decision to adopt the change to the acknowledged
8 comprehensive plan or the land use regulation; and

9 “(b) Requested in writing that the local government give notice of
10 the change to the acknowledged comprehensive plan or the
11 land use regulation.” (Emphasis added.)

12 The “notice of the decision” referred to in ORS 197.830(9) is the written notice
13 that ORS 197.615(4) requires the local government to mail or otherwise deliver
14 to participants. Thus, the 21-day period to appeal to LUBA under the second
15 sentence of ORS 197.830(9) commences on the date the notice of the decision is
16 mailed or otherwise submitted to “parties entitled to notice under ORS 197.615.”
17 *Hatley v. Umatilla County*, 66 Or LUBA 433, 440 (2012).

18 The city moves to dismiss the appeal as untimely filed. First, the city
19 argues that each of the petitioners had “actual notice” of the decision more than
20 21 days before the NITA was filed and thus the appeal is not timely filed.⁷
21 Petitioners respond, and we agree, that actual notice is not relevant to determining

thereafter shall not be deemed timely filed, and the appeal shall be
dismissed.”

⁷ The city does not assert that “actual notice” satisfies the city’s obligation set
out in ORS 197.615(4) to mail or otherwise deliver the required notice.

1 the deadline for filing a NITA where the decision is a plan and land use regulation
2 amendment (PAPA). The deadline for filing an appeal of a PAPA commences on
3 the date of the required mailing or delivery of notice under ORS 197.615(4).
4 Accordingly, whether and when petitioners had actual notice of the challenged
5 decision is immaterial to our analysis and disposition.

6 Second, the city relies on the sentence in ORS 197.830(9) that “[f]ailure to
7 include a statement identifying when, how and to whom notice was provided
8 under ORS 197.615 does not render the notice defective.” However, that sentence
9 is intended to address a situation in which a notice of decision fails to include the
10 information required by ORS 197.615(5) and perhaps an assignment of error that
11 argues that a notice of decision that does not include that information means that
12 the notice is defective and remand is required.⁸ That sentence does not address
13 timeliness of filing of an appeal of a PAPA decision.

⁸ ORS 197.615(5) provides:

“The notice required by subsection (4) of this section must state how and where the materials described in subsection (2) of this section may be obtained and must:

“(a) Include a statement by the individual delivering the notice that identifies the date on which the notice was delivered and the individual delivering the notice;

“(b) List the locations and times at which the public may review the decision and findings; and

1 Next, the city argues that the notice of intent to appeal was filed more than
2 21 days after the date the decision sought to be reviewed was “mailed or
3 otherwise submitted” to each of the two petitioners, whom the city agrees are
4 “parties entitled to notice under ORS 197.615” within the meaning of ORS
5 197.830(9). The city takes the position that on September 21, 2023, notice of the
6 Housing Needs Analysis Ordinance was “mailed” to McAdams and to 1000
7 Friends’ executive director, and was “otherwise submitted” by email to 1000
8 Friends’ attorney. Motion to Dismiss 3-4.

9 The parties previously stipulated to suspend the deadline for the city to
10 transmit the record, so we do not possess the city’s record of proceedings. The
11 city has not moved for us to take evidence pursuant to OAR 661-010-0045.
12 Nevertheless, to support its assertion, the city provides evidence attached to the
13 Reply. The Reply includes a Declaration dated September 3, 2024, from the city
14 recorder (Declaration). The Declaration includes exhibits, which include the
15 Certificate of Mailing of the notice of final decision for the Housing Needs
16 Analysis Ordinance and the Certificate of Mailing of the notice of final decision
17 for the UGB Ordinance. Declaration Ex B.

18 The Certificate of Mailing for the Housing Needs Analysis Ordinance
19 states that the “Notice of Decision and Final Findings were sent for the following

“(c) Explain the requirements for appealing the land use decision
under ORS 197.830 to 197.845.”

1 City File Numbers * * * TA 23-0[-]56 Housing Needs Analysis[,]” and that the
2 city recorder “hereby certif[ies] that [they] mailed a copy of the Notice of
3 Decision to those who provided testimony and comments at the September 18,
4 2023, North Plains City Council Meeting on September 21, 2023.” Declaration
5 Ex B, at 7. The Certificate of Mailing for the Housing Needs Analysis Ordinance
6 identifies five persons at five addresses. Declaration Ex B, at 8. One of the
7 persons identified on the Certificate of Mailing is McAdams. *Id.*

8 Exhibit B to the Declaration also includes the Certificate of Mailing of the
9 notice of final decision for the UGB Ordinance. Declaration Ex B, at 9-11. The
10 Certificate of Mailing for the UGB Ordinance identifies 27 persons at 27 physical
11 addresses. Declaration Ex B, at 10. One of the persons is the executive director
12 of 1000 Friends, and another of the persons is McAdams. *Id.* The Certificate of
13 Mailing for the UGB Ordinance also includes a list of 33 email addresses.
14 Declaration Ex B, at 11. One of the email addresses is for 1000 Friends’ attorney.

15 In the Declaration, the recorder declares that:

16 “2. In the course of [their] duties, [they] *mailed and/or emailed*
17 Final Order and Notice of Decision for City Files CPA 23-056(1)
18 (‘Ordinance 490’) [the UGB Ordinance] and CPA 23-056(2)
19 (‘Ordinance 489’) [the Housing Needs Analysis Ordinance] *to*
20 *everyone on the mailing lists*, whether they testified for one, the
21 other, or both, because both City Files CPA 23-056(1) and CPA 23-
22 056(2) were presented together from the beginning of the
23 proceedings. A copy of the single PDF containing both Notices of
24 Decision is attached as Exhibit A.

25 “3. On June 21, 2024, I sent an email to the city attorney in which I
26 explained that the combined notice of decision for both decisions

1 *was placed into each envelope and mailed to everyone on both*
2 *mailing lists.” (Emphases added.)*⁹

3 **A. Petitioner McAdams**

4 OAR 661-010-0025(1)(d) provides that the record must include

5 “[n]otices of proposed action, public hearing and adoption of a final
6 decision, if any, published, posted or mailed during the course of the
7 land use proceeding, including affidavits of publication, posting or
8 mailing. *Such notices shall include any notices concerning*
9 *amendments to acknowledged comprehensive plans or land use*
10 *regulations given pursuant to ORS 197.610(1) or 197.615(1) and*
11 *(2).” (Emphasis added.)*

12 The Certificate of Mailing is a notice that is required to be included in the record,
13 and we understand it to be the city’s official record of compliance with ORS
14 197.615(4) for the Housing Needs Analysis Ordinance. We conclude that the
15 Certificate of Mailing for the Housing Needs Analysis Ordinance is reliable
16 evidence that establishes that the notice of the decision on the Housing Needs
17 Analysis Ordinance was mailed to McAdams on September 21, 2023. Although
18 petitioners assert in their Response that McAdams did not receive the mailed
19 notice, the failure of affected persons to receive notice of a post
20 acknowledgement plan amendment does not make notice of the amendment

⁹ One exhibit to the Declaration is a June 24, 2024, email from the city recorder to the city attorney and other recipients stating that the recorder mailed or emailed the final order and notice of decision for both the Housing Needs Analysis Ordinance and the UGB Ordinance “to everyone, whether they testified for one, the other, or both, since they were presented together from the very start[.]” and referencing an attached pdf. Declaration Exhibit A.

1 legally inadequate if statutory notice obligations are otherwise shown to be
2 satisfied. *Waite v. City of La Grande*, 31 Or LUBA 77, 81 (1996). Accordingly,
3 McAdams did not timely file their notice of intent to appeal within 21 days of
4 September 21, 2023, the date the notice of the decision was mailed to McAdams.
5 We grant the city’s motion to dismiss as to McAdams.

6 **B. Petitioner 1000 Friends**

7 The Certificate of Mailing for the Housing Needs Analysis Ordinance
8 contains no evidence that the city mailed or otherwise delivered notice of that
9 decision to 1000 Friends’ executive director or attorney. Instead, the city relies
10 on the Declaration to demonstrate that the city mailed notice of the decision for
11 the Housing Needs Analysis Ordinance to 1000 Friends’ executive director and
12 emailed that notice to 1000 Friends’ attorney.

13 We conclude that the Declaration does not include sufficient facts to
14 overcome the contemporaneous Certificate of Mailing for the Housing Needs
15 Analysis Ordinance, which, as noted, lists only five persons to whom a copy of
16 the notice of decision was *mailed* to physical addresses, which list does not
17 include either 1000 Friends’ executive director or attorney, and which does not
18 refer to emailing at all.¹⁰ The Declaration is not part of the record of compliance
19 with ORS 197.615(4). It is a statement of the city recorder’s recollection of the

¹⁰ Although it may be possible for a local government to issue a correction to an otherwise incomplete or erroneous certificate of mailing, the city has not done so in this case.

1 method of delivery of the notices of decision approximately one year after that
2 delivery allegedly occurred. The Declaration states that documents were “mailed
3 and/or emailed * * * to everyone on the mailing lists, whether they testified for
4 one, the other, or both, because both [the Housing Needs Analysis Ordinance and
5 the UGB Ordinance] were presented together from the beginning of the
6 proceedings[,]” but then only describes mailing, stating that the decisions were
7 “placed *into each envelope and mailed* to everyone on both mailing lists.”
8 Declaration 1 (emphasis added). The Declaration does not explain how the city
9 recorder could have placed notices of decision for both the Housing Needs
10 Analysis Ordinance and the UGB Ordinance in an envelope where the only
11 address in the city’s possession was an email address. The city has not introduced
12 any evidence that supports the statement in the Declaration that the city recorder
13 emailed notice to persons who provided only an email address, such as a copy of
14 the email. Declaration Ex B, at 11. Conversely, the Response includes a
15 Declaration from 1000 Friends’ attorney (1000 Friends’ Second Declaration) that
16 in turn includes an August 8, 2024, email from the city recorder to 1000 Friends’
17 attorney responding to 1000 Friends’ July 22, 2024 public records request. The
18 recorder’s email states in relevant part “I have spent time every day going back
19 through emails from September 2023 and do not find [a] record of the [notice of
20 decision] being emailed to those on your list below.” 1000 Friends’ Second
21 Declaration Ex 6, at 1. The list in 1000 Friends’ public records request was the
22 same list of persons that the Certificate of Mailing for the UGB Ordinance states

1 were emailed notice of that decision. We conclude that the Declaration does not
2 provide sufficient evidence to overcome the Certificate of Mailing for the
3 Housing Needs Analysis Ordinance or support that the city mailed or otherwise
4 delivered the notice of the decision on Housing Needs Analysis Ordinance to
5 1000 Friends’ executive director or attorney.¹¹

6 Finally, the city argues that McAdams is the Board Chair of 1000 Friends
7 and that mailing notice to McAdams was sufficient to mail or otherwise provide
8 notice of the decision to 1000 Friends. In the Response, petitioners take the
9 position that

10 “petitioner McAdams was not representing 1000 Friends, nor did
11 she testify on behalf of 1000 Friends, nor did she request in writing
12 to receive notice of the decision on behalf of 1000 Friends pursuant
13 to ORS 197.615(4). The only person who represented 1000 Friends
14 in the proceedings for [the Housing Needs Analysis Ordinance] was
15 [1000 Friends’ staff attorney].” Response to Motion to Dismiss 17.

16 The city does not respond to petitioners or otherwise point to anything that
17 demonstrates that McAdams testified on behalf of 1000 Friends, represented

¹¹ Further, the Certificates of Mailing for the Housing Needs Analysis Ordinance and for the UGB Ordinance certify that the recorder “mailed” a copy of the notice of the decision to “those who provided testimony and comments at the September 18, 2023 * * * [c]ity [c]ouncil [m]eeting.” Declaration Ex B, at 7. The problems with that statement are two-fold. First, the Certificates do not include any reference to emailing at all. Second, as petitioners correctly point out, the minutes of the September 18, 2023, city council meeting demonstrate that no public testimony was provided or allowed at that meeting. Response to Motion to Dismiss 5; *see* Motion to Dismiss Ex 2, at 3-4.

1 1000 Friends, or requested in writing to receive notice of the decision on behalf
2 of 1000 Friends. Accordingly, we reject the city’s argument that mailing notice
3 of the decision to McAdams at their address was sufficient to satisfy the
4 requirements of ORS 197.615(4) for 1000 Friends.

5 In conclusion, McAdams did not timely file their appeal of the Housing
6 Needs Analysis Ordinance and is dismissed from this appeal. 1000 Friends timely
7 filed their appeal of the Housing Needs Analysis Ordinance within 21 days of
8 June 25, 2024, and the city’s motion to dismiss is denied as to 1000 Friends.

9 **RECORD TRANSMITTAL**

10 The next step in the review proceeding is transmittal of the record. The city
11 shall transmit the record to the Board and serve 1000 Friends a copy of the record
12 within 21 days of the date of this order.

13 Dated this 13th day of November 2024.

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Melissa M. Ryan
Board Member