

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

3
4 COLIN CARVER,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11 and

12
13 WESTWOOD HOMES, LLC,
14 *Intervenor-Respondent.*

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16
17 LUBA No. 2014-097

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Washington County.

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24 Colin Carver, Portland, represented himself.

25
26 Alan A. Rappleyea, County Counsel, Hillsboro, represented respondent.

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28 Michael C. Robinson, Portland, represented intervenor-respondent.

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30 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
31 Member, participated in the decision.

32
33 DISMISSED 01/02/2015

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35 You are entitled to judicial review of this Order. Judicial review is
36 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision approving a partition and subdivision of land to construct a residential development.

MOTION TO INTERVENE

Westwood Homes, LLC (intervenor), the applicant below, moves to intervene on the side of the county. The motion is granted.

JURISDICTION

On November 19, 2014, intervenor filed a motion to dismiss this appeal, on the grounds that the notice of intent to appeal (NITA) was not filed with LUBA within 21 days of the date the challenged decision became final, as required by ORS 197.830(9) and OAR 661-010-0015(1)(a).¹ Petitioner has not responded to the motion to dismiss.

The hearings officer signed the challenged decision on October 6, 2014. The notice of the decision mailed to the parties states that the date of decision was October 9, 2014. Petitioner mailed a copy of the NITA to LUBA on October 30, 2014, and LUBA received that copy the next day, on October 31, 2014. The certificate of service attached to the NITA states that the NITA was filed with LUBA by first class mail. However, the envelope in which the NITA

¹ OAR 661-010-0015(1)(a) provides, in relevant part:

“The Notice, together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, 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 filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.”

1 was mailed to LUBA bears a U.S. Postal Service label stating that the envelope
2 was mailed “Certified Mail.”

3 Intervenor argues that the NITA was untimely filed, for two alternative
4 reasons. First, intervenor argues that the city’s decision became final for
5 purposes of appeal to LUBA on October 6, 2014, the date the hearings officer
6 signed it. OAR 661-010-0010(3).² Intervenor notes that the county’s
7 Community Development Code (CDC) 211-4 provides that “[f]or purposes of
8 appeal to LUBA, a written decision of the Director or Hearings Officer is final
9 on the date it is signed.” Intervenor contends that, notwithstanding the
10 erroneous statement on the notice of decision that the decision became final
11 October 9, 2014, pursuant to CDC 211-4 the decision became final on the date
12 it was signed, October 6, 2014, more than 21 days prior to the date the NITA
13 was filed with LUBA.

14 Alternatively, intervenor argues that, even assuming the challenged
15 decision became final on October 9, 2014, the NITA was filed on October 31,
16 2014, the date that LUBA received it, which is 22 days from October 9, 2014.
17 According to intervenor, a NITA is deemed filed on the date of mailing only if
18 the NITA is mailed by registered or certified mail. OAR 661-010-0015(1)(b).³

² OAR 661-010-0010(3) defines “final decision” as a decision that is
“reduced to writing and bears the necessary signatures of the decision maker(s),
unless a local rule or ordinance specifies that the decision becomes final at a
later date, in which case the decision is considered final as provided in the local
rule or ordinance.”

³ OAR 661-010-0010(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

1 A NITA mailed by first class mail is deemed filed on the date that LUBA
2 receives it.

3 Because the envelope in which the NITA was mailed to LUBA bears a
4 U.S. Postal Service label indicating that the envelope was mailed by certified
5 mail, we will assume that pursuant to OAR 661-010-0015(1)(b) the NITA was
6 filed with LUBA on the date it was mailed: October 30, 2014. However, we
7 agree with intervenor that even under that assumption the NITA was filed more
8 than 21 days from the date the challenged decision became final. Under both
9 CDC 211-4 and OAR 661-010-0010(3), the challenged decision became final
10 on October 6, 2014, when the hearings officer signed it. No local rule or
11 ordinance cited to our attention provides for a later date of finality; indeed,
12 CDC 211-4 provides that a hearings officer decision is final when signed. The
13 notice of decision erroneously stated that the date of the decision was October
14 9, 2014. However, an erroneous statement in a notice of decision regarding the
15 date a decision becomes final does not change the date that decision becomes
16 final, or provide a basis to appeal the decision more than 21 days from the date
17 the decision became final. *VK Northwest, Inc. v. City of West Linn*, 60 Or
18 LUBA 39, 42 (2009).

19 Petitioner failed to file a timely appeal of the challenged decision.
20 Therefore, the appeal must be dismissed. OAR 661-010-0015(1)(a).

filing the 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 **RECORD OBJECTION**

2 Intervenor filed an objection to the record, arguing that a portion of a
3 staff report was omitted. The county agrees to supplement the record to
4 include the omitted portion of the staff report if the motion to dismiss is denied.
5 Because this appeal must be dismissed, there is no point in resolving the record
6 objection.

7 This appeal is dismissed.