

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

3  
4 NO CASINO ASSOCIATION,                                   )  
5                                   )  
6                                   Petitioner,                                   )  
7                                   )  
8                                   vs.                                   )  
9                                   )  
10 CITY OF LINCOLN CITY,                                   )  
11                                   )  
12                                   Respondent.                                   )  
13

LUBA No. 95-109

FINAL OPINION  
AND ORDER

14  
15                   Appeal from Lincoln City.

16  
17                   Brian D. Green, Lincoln City, represented petitioner.

18  
19                   Christopher P. Thomas, Portland, represented  
20 respondent.

21  
22                   LIVINGSTON, Chief Referee; HANNA, Referee; GUSTAFSON,  
23 Referee, participated in the decision.

24  
25                   DISMISSED                                   10/17/95

26  
27                   You are entitled to judicial review of this Order.  
28 Judicial review is governed by the provisions of ORS  
29 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision to extend water and  
4 sewer facilities to a casino.

5 **FACTS**

6 The Siletz tribe (tribe) wishes to build the Chinook  
7 Winds Gaming Center (casino) on tribal reservation lands  
8 located within the city limits. On April 4, 1995, the tribe  
9 filed a water connection application with the city. On  
10 April 18, 1995, the tribe filed a sewer connection  
11 application with the city and paid the systems development  
12 charges associated with the water and sewer applications.  
13 On April 27, 1995, the city engineer approved the  
14 applications. On May 4, 1995, after the tribe paid  
15 additional charges, the city issued a work order authorizing  
16 installation of a water meter.

17 On May 8, 1995, petitioner's attorney notified the city  
18 attorney that petitioner demanded notice and a hearing on  
19 the tribe's water service application, on the ground that it  
20 was a land use application.

21 On May 9, 1995, the city delivered a water meter to the  
22 casino site. The city attorney told the tribe that it could  
23 proceed to install water and sewer hookups.

24 On May 11, 1995, the city attorney notified  
25 petitioner's attorney by facsimile transmission that as of  
26 May 9, 1995, processing of the tribe's water and sewer

1 applications was complete and billing of the tribe had  
2 begun. The city attorney also informed petitioner's  
3 attorney that "[s]ince the City does not issue a document to  
4 applicants on completion of processing of water and sewer  
5 service applications, the City has not issued any written  
6 document in this case." Record 11-12.

7 On May 19, 1995, petitioner filed a notice of appeal  
8 with the city planning commission. On May 30, 1995, the  
9 city attorney sent a letter to petitioner's attorney stating  
10 that the city's authorization of water and sewer extensions  
11 to the casino was a "non-discretionary, ministerial" action  
12 appealable neither to the planning commission nor the city  
13 council. On June 2, 1995, petitioner filed a notice of  
14 intent to appeal with this Board.

15 **MOTION TO DISMISS**

16 The city moves to dismiss this appeal on the ground it  
17 was not timely filed.<sup>1</sup> Our rules require that the notice of  
18 intent to appeal be received by the Board "on or before the  
19 21st day after the date the decision sought to be reviewed  
20 becomes final or within the time provided by ORS 197.830(3)  
21 through (5)."<sup>2</sup> OAR 661-10-015(a). This requirement is

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<sup>1</sup>The city also contends that the challenged decision is not a land use decision, but does not move to dismiss on that basis. The parties do not fully address the nature of the decision in their memoranda. For the purpose of deciding this motion only, we assume the challenged decision is a land use decision.

<sup>2</sup>ORS 197.830 states, in relevant part:

1 jurisdictional. Id.

2 The city contends that, at the latest, the city's

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(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

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

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

"(4) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

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

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

"(5) (a) Except as provided in paragraph (b) of this subsection, the appeal period described in subsection (3) of this section shall not exceed three years after the date of the decision.

"(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.763, 197.195, 215.416(11) or ORS 227.175(10) is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

1 decision became final and notice thereof was delivered to  
2 petitioner on May 11, 1995. The city notes that June 2,  
3 1995, when petitioner filed its notice of intent to appeal  
4 to LUBA, is 22 days after May 11, 1995.

5 Petitioner has four responses: (1) the city's motion  
6 to dismiss is untimely; (2) there was no written final  
7 decision to appeal on May 11, 1995; (3) petitioner had to  
8 exhaust local appeals before appealing to LUBA; and (4) the  
9 city failed to meet the notice requirements of ORS 197.615  
10 and 197.763, as well as Lincoln City Zoning Ordinance (LCZO)  
11 9.030(7) and 9.040(5).

12 **A. Timeliness of Motion to Dismiss**

13 Petitioner contends the city's motion to dismiss is  
14 untimely because it was not filed within 10 days of the date  
15 the city received petitioner's notice of intent to appeal to  
16 LUBA. Petitioner relies on our rule addressing motions,  
17 which states, in relevant part:

18 "Time of Filing: A party seeking to challenge the  
19 failure of an opposing party to comply with any of  
20 the requirements of statutes or Board rules shall  
21 make the challenge by motion filed with the Board  
22 and served on the adverse party within 10 days  
23 after the moving party obtains knowledge of such  
24 alleged failure. \* \* \*." OAR 661-10-065(2).

25 A challenge to our jurisdiction may be brought at any  
26 time and is not subject to the ten-day requirement of  
27 OAR 661-10-065(2). See Elliott v. Lane County, 18 Or LUBA  
28 871, 874 (1990).

29 **B. Written Final Decision**

1           The subject decision concerns the extension of water  
2 and sewer services to the casino under the Lincoln City  
3 Municipal Code (LCMP), which is distinct from the city's  
4 zoning ordinance. The LCMP states:

5           "A. Application for sewer and/or water connection  
6 shall only be made either in conjunction with  
7 a building permit or for an existing  
8 structure. Application shall be made to the  
9 department of public works upon forms  
10 approved by that department.

11           "B. Application approval shall be conditional  
12 upon the availability of sewer and/or water  
13 as determined by the department of public  
14 works, and upon the payment in full of  
15 systems development charges. \* \* \*" LCMP  
16 13.12.090.

17 The LCMP contains no appeal provisions.

18           Petitioner contends that there was no written final  
19 decision to appeal on May 11, 1995. Petitioner relies on  
20 OAR 661-10-010(3):

21           "Final Decision": A decision becomes final when  
22 it has been reduced to writing and bears the  
23 necessary signatures of the decision maker(s),  
24 unless a local rule or ordinance specifies that  
25 the decision becomes final at a later time, in  
26 which case the decision is considered final as  
27 provided in the local rule or ordinance."

28           Petitioner argues that because the city's decision does not  
29 satisfy the definition of "final decision" in OAR 661-10-  
30 010(3), the city attorney's facsimile transmission did not  
31 give notice of a final decision.

32           The city responds first, that the city's decision on  
33 water and sewer service was as final as city decisions on

1 water and sewer service ever are; and second, that if the  
2 city's decision was not final by May 11, 1995, it still is  
3 not final and cannot be appealed. We agree with the city  
4 that the physical form of the decision is less important  
5 than the finality accorded it by the city's codes and  
6 procedures and by subsequent actions relying upon it. See  
7 Komning v. Grant County, 20 Or LUBA 481, 486-87 (1990)(where  
8 appeal not permitted by local government, letter from county  
9 counsel to petitioners constitutes a final decision for  
10 purposes of LUBA review). Moreover, we note the decision to  
11 extend water and sewer service is reduced to writing and  
12 signed by the city engineer. Record 27-28. Since there is  
13 no procedure available for the local appeal of the  
14 challenged decision, it is appealable to LUBA. See ORS  
15 197.825(2)(a).

16 **C. Exhaustion of Local Appeals**

17 Petitioner contends it was required by LCZO 9.040 to  
18 appeal the challenged decision to the planning commission.  
19 LCZO 9.040 states, in relevant part:

20 "A decision of the Planning Department on the  
21 issuance of an administrative permit or  
22 discretionary action concerning a land use matter  
23 may be appealed to the Planning Commission by an  
24 affected party by filing an appeal with the  
25 Planning and Community Development Director within  
26 ten (10) days of the mailing of the decision. \* \*  
27 \*"

28 The challenged decision was made not by the city  
29 planning department, but by the city engineer. It was made

1 under not the LCZO, but the LCMP. LCZO 9.040 therefore has  
2 no application to the decision. The pursuit of a  
3 nonexistent local right of appeal does not suspend the date  
4 a land use decision becomes final for purposes of appeal to  
5 LUBA. Smith v. Douglas County, 98 Or App 379, 780 P2d 232  
6 (1989); Forest Park Neigh. Assoc. v. City of Portland, 26 Or  
7 LUBA 636, 640 (1994).<sup>3</sup>

8 **D. Notice Requirements**

9 Petitioner contends the challenged decision  
10 "necessarily amounts to land use decisions, 'exceptions' to  
11 land use goals and/or an amendment of the City's  
12 comprehensive plan and the applicable PUD." Answer to  
13 Respondent's Motion to Dismiss 4. Petitioner maintains it  
14 was entitled to notice under ORS 197.615 and 197.763, as  
15 well as LCZO 9.030(7) and 9.040(5).

16 The record reflects that petitioner had individual  
17 written notice of the challenged decision no later than May  
18 11, 1995. Nevertheless, petitioner did not file a timely  
19 appeal.

20 This appeal is dismissed.

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<sup>3</sup>The city attorney notified petitioner on May 30, 1995 that the planning commission would not hear its appeal. Record 1. Petitioner contends that May 30, 1995 is therefore the date of the city's final decision for purposes of calculating the deadline for filing a notice of intent to appeal to LUBA.

The May 30, 1995 letter is a notice to petitioner only of the city's decision not to allow an appeal to the planning commission. If petitioner had chosen to appeal that decision, its appeal would have been timely. See Mills v. City of Yachats, 29 Or LUBA \_\_\_\_ (LUBA No. 94-161, March 1, 1995).