

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

3
4 DEE ELINSKI and MIKE ELINSKI,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 CITY OF LINCOLN CITY,)
11)
12 Respondent,)
13)
14 and)
15)
16 KI CHO,)
17)
18 Intervenor-Respondent.)

LUBA No. 97-034

FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Lincoln City.

22
23 Dee Elinski and Mike Elinski, Lincoln City, filed the
24 petition for review on their own behalf. Dee Elinski argued
25 on her own behalf.

26
27 No appearance by respondent.

28
29 Dennis L. Bartoldus, Newport, filed the response brief
30 and argued on behalf of intervenor-respondent.

31
32 LIVINGSTON, Administrative Law Judge; HANNA,
33 Administrative Law Judge, participated in the decision.

34
35 DISMISSED 11/26/97

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 approving a conditional use permit for a four-unit
5 condominium project.

6 **MOTION TO INTERVENE**

7 Ki Cho (intervenor), the applicant below, moves to
8 intervene on the side of the respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 On April 18, 1966, intervenor filed an application for
12 a conditional use permit to build a four-unit condominium on
13 a lot zoned Recreation Commercial (R-C) with an
14 Environmental Quality (EQ) zone overlay. After a hearing on
15 October 15, 1996, the city planning commission approved the
16 application with conditions. Petitioners appealed to the
17 city council, which adopted a written final order signed and
18 dated February 10, 1997. The final order upheld the
19 planning commission's decision.

20 This appeal followed.

21 **MOTION TO DISMISS**

22 Intervenor-Respondent (intervenor) moves to dismiss
23 this appeal for lack of jurisdiction on the ground that
24 petitioners did not file their notice of intent to appeal
25 within 21 days after the date the county's decision became
26 final as required by ORS 197.830(8) and Wicks-Snodgrass v.

1 City of Reedsport, 148 Or App 217, 939 P2d 625, rev den 326
2 Or 59 (1997) (petition for reconsideration pending).¹

3 The decision challenged in this appeal was signed by
4 the mayor on February 10, 1997. Record 9. Petitioners'
5 notice of intent to appeal the city's decision was filed
6 with LUBA on March 12, 1997, 30 days after the decision was
7 signed by the Mayor. Intervenor argues that petitioners'
8 appeal was not timely filed under ORS 197.830(8), and must
9 be dismissed. Petitioners respond that because written
10 notice of the decision was not given until February 19,
11 1997, the 21-day period stated in ORS 197.830(8) for an
12 appeal to LUBA did not begin until that date.²

13 Until recently, the rule established by the Oregon
14 Court of Appeals in League of Women Voters v. Coos County,
15 82 Or App 673, 729 P2d 588 (1986), was that, under most
16 circumstances, the time for appealing a local land use
17 decision or limited land use decision was tolled from the
18 time the decision was signed until the local body provided
19 notice of the decision to the appealing party. However, the

¹ORS 197.830(8) provides, in relevant part:

"A notice of intent to appeal a land use decision or limited
land use decision shall be filed not later than 21 days after
the date the decision sought to be reviewed becomes final."

²The letter upon which petitioners rely to show when notice of the
challenged decision was mailed is not in the record, but is attached as an
exhibit to petitioners' Memorandum in Regards to Jurisdiction and in
Opposition to the Motion to Dismiss filed by Respondent-Intervenor
(response memorandum). In view of our disposition of intervenor's motion
to dismiss, it is not material when notice of the decision was mailed.

1 court concluded in Wicks-Snodgrass that its earlier reading
2 of ORS 197.830(8) was contrary to the language of the
3 statute, and overturned League of Women Voters. Under the
4 rule announced in Wicks-Snodgrass, the period established by
5 ORS 197.830(8) for the appeal of a local land use decision
6 to LUBA begins to run from the date the local decision
7 becomes final, not from the date when the local government
8 provides notice of the decision. Wicks-Snodgrass, 148 Or
9 App at 223-24.

10 The parties dispute when the city's decision became
11 final. This Board's rules define "final decision" as
12 follows:

13 "A decision becomes final when it is reduced to
14 writing and bears the necessary signatures of the
15 decision maker(s), unless a local rule or
16 ordinance specifies that the decision becomes
17 final at a later time, in which case the decision
18 is considered final as provided in the local rule
19 or ordinance." OAR-661-10-010(3).

20 Petitioners contend that, by local ordinance, the city
21 has specified that land use decisions do not become final
22 until the date notice of the decision is mailed.
23 Petitioners rely on Lincoln City Zoning Ordinance (LCZO)
24 9.040(5), which provides:

25 "(5) Review Body Decision.

26 "(a) Upon review, the reviewing body may
27 affirm, reverse, or modify the decision
28 of the lower body or staff.

29 "(b) Notice of the reviewing body decision
30 shall be provided to all parties to the

1 hearing, within five (5) working days of
2 the date of the final decision. The
3 notice of the decision shall include:

4 * * * * *

5 "(iii) If the reviewing body is the City
6 Council, a statement that the
7 decision may be appealed to the
8 Land Use Board of Appeals by
9 filing a notice of intent to
10 appeal within twenty-one (21)
11 days of the date that the final
12 order was mailed.^[3]

13 * * * * * (Emphasis added.)

14 Petitioners argue that because the language of LCZO
15 9.040(5)(b)(iii) specifies that decisions may be appealed to
16 LUBA within 21 days of the date the final order was mailed,
17 we must infer that the date the decision is mailed is the
18 date it becomes final. Response Memorandum 3. According to
19 petitioners, pursuant to local ordinance and OAR 661-10-
20 010(3), the challenged decision became final on February 19,
21 1997, and the 21-day appeal period began running on that
22 date.

23 We disagree with petitioners. LCZO 9.040(5)(b) does
24 not specify that local decisions become final on the date of
25 mailing. When local decisions become final is specified in
26 LCZO 9.030, which states the city's quasi-judicial hearing
27 procedures and requirements. LCZO 9.030(5) provides:

³It appears that the emphasized language was intended to reflect the notice rule created in League of Women Voters.

1 "* * * If the hearing is in the nature of an
2 appeal, the body may affirm with modifications or
3 additional conditions, reverse or remand the
4 decision that is on appeal.

5 "(a) The decision of the hearing body, which has
6 the authority to approve the application or
7 decide the appeal, shall be by a written
8 order signed by the presiding officer.

9 "(b) The order shall incorporate findings of fact
10 and conclusions that include: * * *

11 "(c) The written order is the final decision in
12 the matter."

13 LCZO 9.030(5) is consistent with the general rule
14 stated in OAR 661-10-010(3): a decision becomes final when
15 it is reduced to writing and bears the necessary signature
16 of the decision maker. That often occurs prior to the date
17 of mailing. LCZO 9.040(5)(b)(iii) requires that a statement
18 regarding appeals to LUBA be included in the city's notices
19 of decision. The fact that, after Wicks-Snodgrass, the
20 statement is misleading and may result in tardy appeals to
21 LUBA does not change the date the city's decision became
22 final. See DeBates v. Yamhill County, ___ Or LUBA ___ (LUBA
23 No. 97-091, September 29, 1997), slip op 4-5; Michael-Mark
24 Ltd. v. Yamhill County, ___ Or LUBA ___ (LUBA No. 97-032,
25 August 4, 1997), aff'd ___ Or App ___ (November 19, 1997).

26 Under OAR 661-10-010(3) and LCZO 9.030(5), the city's
27 decision became final on February 10, 1997. Petitioners'
28 appeal was not timely filed, and we have no jurisdiction.

29 This appeal is dismissed.