BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CASCADE GEOGRAPHIC SOCIETY,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

OREGON DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2008-091

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

James J. Nicita, Oregon City, represented petitioner.

D. Daniel Chandler, Assistant County Counsel, Oregon City, represented respondent.

Kathryn A. Lincoln, Senior Assistant Attorney General, and Bonnie E. Heitsch, Assistant Attorney General, Salem, represented intervenor-respondent.

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

DISMISSED 08/20/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a planning director memorandum concluding that the county Historic Review Board (HRB) is not required to review a state highway project.

MOTION TO DISMISS

The county moves to dismiss this appeal, arguing that (1) it is untimely filed and (2) the challenged decision is not a land use decision or significant impact land use decision subject to LUBA's jurisdiction.

Intervenor Oregon Department of Transportation (ODOT) is in the planning and design stages of project to add a center median lane to a section of Highway 26. The project will take place entirely within the existing right-of-way. ODOT has not sought any permits from the county. In e-mails and letters to the county, counsel for petitioner asserted that (1) ODOT has undertaken tree removal and associated ground disturbance in advance of project construction, (2) the HRB has jurisdiction to review the project, which is in the area of the Barlow Road Historic Corridor, and (3) the county should issue a stay or cease and desist order to ODOT pending the completion of HRB review. In pleadings to LUBA, petitioner characterizes the foregoing communications with the county as a "code enforcement request."

On May 12, 2008, assistant county counsel forwarded to petitioner's counsel by e-mail a memorandum from the county planning director concluding that, under the county's Zoning and Development Ordinance (ZDO) 707, HRB review is required for highway projects affecting the Barlow Road Historic Corridor only for right of way expansions or realignments. Because the ODOT project would take place entirely within the existing right-of-way, the director concluded, the ZDO does not require HRB review.

Petitioner apparently tried to file a local appeal of the May 12, 2008 memorandum, and also requested that the county reconsider the decision. By letter dated June 5, 2008,

county counsel informed petitioner that no local right of appeal exists. On June 20, 2008, petitioner filed with LUBA a notice of intent to appeal challenging the county's "decision not to review" ODOT's project under ZDO 707. The notice states that the challenged decision became final on June 5, 2008, when the county informed petitioner that there is no right of local appeal.

The county argues that the notice of intent to appeal was filed 39 days after the challenged May 12, 2008 memorandum, and is thus untimely filed, under ORS 197.830(9) ("[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") and OAR 661-010-0015(1).[1] To the extent petitioner relies on ORS 197.830(3) to toll the filing date, the county argues, the appeal was filed more than 21 days from the date that petitioner knew or should have known of the decision.[2] Alternatively, the county argues that the

[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) through (5). * * * A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed."

[2] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing 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."

challenged memorandum is a nondiscretionary decision and therefore not a "land use decision" as defined by ORS 197.015(10).[3]

Petitioner responds that the May 12, 2008 memorandum did not become "final" for purposes of ORS 197.830(9) until the county informed petitioner, on June 5, 2008, that the ZDO does not provide for a local appeal of the director's memorandum.[4] Petitioner argues that, under OAR 661-010-0010(3), "[a] decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s) * * *." According to petitioner, the May 12, 2008 memorandum is not signed by the planning director, and is therefore not a final decision as defined by OAR 661-010-0010(3). Petitioner contends that the May 12, 2008 decision became "final" only when the county counsel signed the June 5, 2008 letter informing petitioner that there is no right of local appeal.

Alternatively, petitioner argues that the June 5, 2008 letter is incorrect, and there is in fact a right of local appeal under ZDO 707.07(C)(8)(a) ("[a]ny person may appeal a decision of the Planning Director to the Historic Review Board"). Petitioner contends that the May 12, 2008 decision was not a "final" decision that could have been appealed directly to LUBA, because petitioner is required to exhaust available local remedies, such a remedy exists, petitioner filed a timely local appeal, and the county has yet to provide that local appeal.

We agree with the county that the appeal to LUBA was untimely filed. Petitioner apparently understands the challenged decision to comprise two documents, the May 12, 2008 memorandum, which sets out the substance of the county's response to petitioner's request for an enforcement action, and the June 5, 2008 county counsel letter, which in

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[3] ORS 197.015(10)(b)(A) provides that "land use decision" does not include a decision that is "made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

[4] Petitioner does not argue that the appeal is timely filed under ORS 197.830(3), and in fact states that that statute is inapplicable. We therefore do not consider that statute further.

petitioner's view supplies the necessary signature that finalizes the May 12, 2008 memorandum. However, the June 5, 2008 letter is a separate decision by a different decision maker that determines that there is no local right of appeal under the ZDO, not a document that purports to "sign" the May 12, 2008 memorandum. We do not see that the two decisions somehow combine to make a single decision, or that June 5, 2008 is the date the May 12, 2008 memorandum became "final" and hence appealable for purposes of ORS 197.830(9) and OAR 661-010-0015(1)(a).[5]

It is not entirely clear from the notice of intent to appeal whether petitioner intends to appeal the May 12, 2008 memorandum, the June 5, 2008 letter or both. Both decisions are attached to the notice. The fairest reading of the notice, however, is that it challenges the "decision not to review" the ODOT project under ZDO chapter 707, which can only describe the May 12, 2008 memorandum. Notice of Intent to Appeal 1. As far as we can tell, the June 5, 2008 letter is attached and referred to solely to establish that the May 12, 2008 decision "became final on June 5, 2008." *Id.*

For whatever reason, petitioner chose not to appeal the May 12, 2008 decision directly to LUBA, but instead to pursue a local appeal that the county ultimately determined is not available. As we advised in *Warf v. Coos County*, 42 Or LUBA 84, 102 (2002), "if there is any doubt about the proper venue for appeal and the deadline for such an appeal, the filing of timely precautionary appeals * * * is the only safe course of action." Petitioner did

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[5] If petitioner is correct that the May 12, 2008 memorandum is not a "final" decision because it lacks a necessary signature, then petitioner's appeal of the May 12, 2008 memorandum must be dismissed for that reason alone. LUBA's jurisdiction extends only to final decisions. ORS 197.015(10)(a). That said, we do not necessarily agree with petitioner that the May 12, 2008 decision was not a final decision, because it lacked the "necessary signatures." OAR 661-010-0010(3) does not *require* that the decision be signed by the decision maker, only that, if signatures are necessary to issue the decision, the decision is signed by the decision maker(s). Here, it is not clear that the planning director's signature on the memorandum is "necessary." As with most memoranda, it includes a TO and FROM heading, identifying the planning director as the author of the memorandum. Like most memoranda, it is not signed. Because there is no doubt as to the identity of the decision maker or the authority of that decision maker to issue the decision, and no dispute that the county intended the memorandum to be issued on May 12, 2008 as its definitive response to petitioner's request for an enforcement action, the memorandum is, arguably, the county's final decision on that matter, putting aside the question of the possibility of a local appeal.

not file such a precautionary appeal at LUBA, but relied entirely on the possibility of a local appeal. In that circumstance, if the local government determines that no local appeal is available, petitioner's only recourse is to appeal to LUBA the determination that no local appeal is available. Where such an appeal is filed, the underlying decision is not before LUBA, only the determination that no local appeal is available. If petitioner successfully challenges the decision determining that no local appeal is available, we would remand that decision to the county to provide a local appeal of the underlying decision; otherwise, we would affirm the local government's decision that no local appeal is available.

Here, petitioner did not appeal the June 5, 2008 decision that no local appeal is available. As discussed above, fairly read the notice of intent to appeal challenges only the May 12, 2008 memorandum. If the May 12, 2008 decision is a final decision, then petitioner's appeal is untimely. If the May 12, 2008 decision is not a final decision, we do not have jurisdiction over the appeal. In either case, this appeal must be dismissed.[6]

OTHER MOTIONS

Pending matters include record objections and a motion for stay, pursuant to OAR 661-010-0068.[7] Because we conclude that we lack jurisdiction over the appeal, these motions are denied as moot.

The appeal is dismissed.

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[6] We need not address the county's argument that the challenged decision falls within the nondiscretionary exception to the definition of land use decision.

[7] OAR 661-010-0068 authorizes LUBA to issue an order staying the challenged decision, if the movant demonstrates that a stay is warranted under specified criteria. Here, petitioner seeks to stay further activities by ODOT with respect to the Highway 26 project, pending resolution of this appeal. Although we need not and do not address the motion for stay, we note that we can only stay the effectiveness of the challenged decision, which here simply determines that ODOT's project is not subject to county review under ZDO 707. Granting a stay of the county's decision would not obligate the county to conduct a ZDO 707 review, or enforce the code against ODOT's project, and by itself could do nothing to halt ODOT's activities with respect to the project.