BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J.C. REEVES CORPORATION, Petitioner, vs. WASHINGTON COUNTY, Respondent, and TUALATIN VALLEY SPORTSMEN'S CLUB, Intervenor-Respondent.	LUBA No. 96-226 FINAL OPINION AND ORDER

Appeal from Washington County.

William C. Cox, Portland, represented petitioner.

Alan A. Rappleyea and Dan Olsen, County Counsel, Hillsboro, represented respondent.

Clark I. Balfour and Tamara L. Townsend, Portland, represented intervenor-respondent.

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

DISMISSED 12/19/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals an October 8, 1996 decision of the county board of commissioners granting the Tualatin Valley Sportsmen's Club special use approval as a firearms training facility in the Exclusive Forest and Conservation (EFC) zone.

MOTION TO INTERVENE

The Tualatin Valley Sportsmen's Club (intervenor), the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

On October 28, 1996, the county mailed a "Notice of Decision of Board Appeal" (notice of decision) to parties entitled to notice, including petitioner. The notice of decision provides:

> "This decision may be appealed to the Land Use Board of Appeals (LUBA) by filing a notice of Intent to Appeal with LUBA within 21 days of the date this decision is final. * * *
>
> "* * * * *
>
> "The Washington County Community Development Code [CDC] holds that this decision is final on the date of mailing unless a motion for reconsideration is granted by the Board of County Commissioners." (Emphasis in original.)

The notice of decision is consistent with ORS 197.830(8) and LUBA's own rule, stated in OAR 661-10-015,

which provides in relevant part:

> "(a) The Notice [of intent to appeal] * * * shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed becomes final * * *. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.
>
> "(b) Filing of a notice of intent to appeal with the Board shall be accomplished when the Notice * * * is delivered to or received by the Board on or before the date due. * * *"

Petitioner's notice of intent to appeal was delivered to LUBA on November 19, 1996, 22 days after the date of the county's notice of decision.

MOTION TO DISMISS

The county and intervenor (together, respondents) move to dismiss this appeal on the ground the notice of intent to appeal was not timely filed.[1] Respondents correctly note that the timely filing of the notice of intent to appeal is a jurisdictional event. Ray v. Douglas County, 140 Or App 24, 27-28, 914 P2d 26 (1996).

The parties agree CDC 211 specifies that a decision becomes final "on the date the decision was provided to the parties." (Emphasis added.) Relying on various dictionary definitions of "provided," petitioner contends the decision was "provided" on the date it was received, not the date it was mailed. Petitioner remarks that given the vagaries of

[1]Respondents' request for oral argument on the motion to dismiss is denied.

mail delivery, the notice of decision might not be received from the county until after the deadline for filing a notice of intent to appeal with this Board. Petitioner argues this could result in a denial of equal protection under Article I, section 20 of the Oregon Constitution and the Fourteenth Amendment to the United States Constitution.

We do not reach petitioner's constitutional arguments, which are not sufficiently developed to permit review. We also do not dwell on the practical difficulties that would result if this Board had to determine in every case when individual petitioners actually received written notice of a final decision. The Court of Appeals has construed ORS 197.830(8) and ORS 215.416(10) to say that a decision becomes final for purposes of an appeal to LUBA when the prescribed written notice of decision is mailed or personally delivered to the party seeking to appeal.[2] League of Women Voters v. Coos County, 82 Or App 673, 681, 729 P2d 588 (1986). See also DLCD v. Crook County, 25 Or LUBA 826, 827 (1993). The county's position, stated in the notice of decision, that the notice of decision is "provided" on the day it is mailed is consistent with League of Women Voters. It is also consistent with CDC 211, even if one relies on the definitions of "provide" quoted by

[2]When League of Women Voters was decided, the provisions now appearing at ORS 197.830(8) and 215.416(10) were codified at ORS 197.830(7) and 215.416(8).

petitioner, which do not limit the means by which something is to be "provided."[3]

Petitioner argues next that because the notice of decision has two defects, petitioner did not receive the notice to which it was entitled under ORS 215.416, and therefore its appeal to LUBA is timely. These alleged defects are at most procedural errors. Petitioner cannot prevail on this argument unless it demonstrates the defects explain and excuse its failure to file a timely notice of intent to appeal.

The first alleged defect concerns the statement in the notice of decision that the decision became final under CDC 211 when the notice of decision was mailed on October 28, 1996. As discussed above, that statement is correct. The second alleged defect concerns the explanation in the notice of decision pertaining to when a decision is final if a local petition for reconsideration is filed. However, petitioner does not contend it relied to its detriment on that explanation and so has not established a basis on which to excuse its failure to file a timely notice of intent to appeal with LUBA.

Petitioner contends finally that the "delivered to or received" language in OAR 610-10-015(1)(b) specifies two

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[3]For example, petitioner quotes Blacks Law Dictionary 1224 (6th ed. 1992), which defines "provide" as "to make, procure, or furnish for future use, prepare" or "to supply (someone with something)."

means of filing a notice of intent to appeal with this Board. Petitioner argues at length that depositing a notice of intent to appeal in the mail is tantamount to delivery. The argument is inconsistent with both petitioner's first argument and this Board's established interpretation of OAR 610-10-015(1)(b). See Oak Lodge Water District v. Clackamas County, 18 Or LUBA 643, 645 (1990) (a notice of intent to appeal mailed to LUBA within the 21-day time limit, but received by LUBA after the 21-day time limit has expired, is not timely filed).

This appeal is dismissed.[4]

[4]On December 16, 1996, respondents moved to file a reply to petitioner's response to the motion to dismiss. As respondents recognize, a reply to a response to a motion to dismiss is not authorized by our rules. We do not find a reply helpful in this case and therefore deny the motion.