BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF GRANTS PASS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 93-102
JOSEPHINE COUNTY,	)	
	)	FINAL OPINION
Respondent.	)	AND ORDER

Appeal from Josephine County.

Ulys Stapleton, City Attorney, Grants Pass, represented petitioner.

Gloria M. Roy, Assistant County Counsel, Grants Pass, represented respondent.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

DISMISSED 08/12/93

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

Opinion by Sherton.

INTRODUCTION

On March 31, 1993 the Josephine County Board of Commissioners held a public hearing concerning the proposed zone change that is the subject of the challenged decision. On May 12, 1993, the Josephine County Board of Commissioners signed a document entitled "Findings and Decision" that bears the following caption:

> "In the Matter of the Request For:
>
> "A Zone Change from RR-2.5 (Rural Residential - 2.5 Acre Minimum) to RR-1 (Rural Residential - 1 Acre Minimum) for Property Located at 1500 Merlin Road More Specifically Described [as] 35-6-22-3, Tax Lot 1000." Motion to Dismiss Exhibit B.

This Findings and Decision document (hereafter decision document) includes a section identifying applicable criteria, a findings of fact section, a reasons section and a decision section stating that the application is approved.

On May 14, 1993, the county mailed to interested parties, including petitioner, a notice stating that "Findings of Fact have been signed by the Board of Commissioners in the matter of [this zone change] application." Motion to Dismiss Exhibit C. The notice also identifies the application, states the findings were signed on May 12, 1993, and provides that appeals of the board of commissioners' decision must be filed with LUBA no later than 21 days after the date the findings were signed.

On June 9, 1993, the board of commissioners adopted and

signed Josephine County Ordinance No. 93-7, entitled "An Ordinance Amending the Zoning Map of Josephine County (Ordinance 85-1 As Amended) [from RR-2.5 to RR-1 for the property described above]." This ordinance provides that the "Josephine County Zoning Map is hereby amended" from RR-2.5 to RR-1 for the subject property. The ordinance recites that the board of commissioners previously held a public hearing, heard testimony and concluded the proposed zone change complies with the requirements of state law and county land use regulations. However, the ordinance does not identify applicable criteria, or adopt findings of fact or a statement of reasons.

On June 30, 1993, petitioner filed with LUBA a notice of intent to appeal "the land use decision of the respondent, which became final June 9, 1993, which decision approved a zone change for [the subject property] from RR-2.5 to RR-1." On July 8, 1993, respondent filed a motion to dismiss petitioner's appeal. On July 19, 1993, petitioner filed a response to the motion and an amended notice of intent to appeal, identifying the challenged land use decision as Ordinance No. 93-7, adopted by the board of commissioners on June 9, 1993.

MOTION TO DISMISS

Respondent argues that under both OAR 661-10-010(3) and Josephine County Land Use Hearing Rules (LUHR) 15(3), the county's land use decision regarding the subject zone change

became final when the board of commissioners signed the decision document on May 12, 1993.[1] Respondent further argues that the notice of this postacknowledgment land use regulation amendment required by ORS 197.615 was mailed to petitioner on May 14, 1993. According to respondent, under ORS 197.830(8) and OAR 661-10-015(1), any notice of intent to appeal this land use decision was required to be filed on or before June 4, 1993, 21 days after the notice required by ORS 197.615 was mailed. Crew v. Deschutes County, 23 Or LUBA 148 (1991). Respondent contends petitioner's notice of intent to appeal was untimely filed and, therefore, this appeal must be dismissed. OAR 661-10-015(1).

Petitioner contends a zone change may only be made by ordinance. Petitioner argues the May 12, 1993 decision document is not a reviewable land use decision because it is not a "final" decision that affects the use of the subject property. Petitioner argues a local government decision is final only when nothing further needs to be done for the

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[1]OAR 661-10-010(3) provides:

> "'Final decision': A decision becomes final when it 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 time, in which case the decision is considered final as provided in the local rule or ordinance."

Subsection (3) of LUHR 15 (Final Decision) provides:

> "The decision of the Hearings Body shall not become final until after the Findings of Fact, Reasons and Conclusions, and Decision are approved and signed."

decision to be effective. Columbia River Television v. Multnomah County, 11 Or LUBA 241, 243, aff'd 70 Or App 448 (1984), rev'd 299 Or 325 (1985). Petitioner also argues this Board previously stated:

> "In order for this board to have jurisdiction, there must first be a final decision or determination by a local government * * *. By this we believe the legislature meant more than that the local government * * * have finally expressed its position on a matter which may be in dispute with a third party. To be a land use decision, we believe the local government's action must, of its own force, affect in some way the use of land. See Medford Assembly of God v. City of Medford, [6 Or LUBA 68 (1982)]." (Footnote omitted.) West v. West Linn, 6 Or LUBA 139, 143 (1982).

According to petitioner, there was no change in the way the subject property could be used until the challenged ordinance was adopted on June 9, 1993.

Petitioner also contends respondent's interpretation of LUHR 15(3) is erroneous. Petitioner argues LUHR 15(3) merely says that a decision is not final until some unspecified time after a findings and decision document is signed. According to petitioner, this does not eliminate the possibility that other events, such as adopting an ordinance, may remain to be done before a decision becomes final. Finally, petitioner argues respondent erroneously advised it that the subject decision was not final until

June 9, 1993.[2]

If the county's May 12, 1993 decision document is a final, reviewable land use decision, then under ORS 197.830(8) and OAR 661-10-015(1), the 21-day period for filing a notice of intent to appeal began to run on May 14, 1993, when petitioner was mailed the notice required by ORS 197.615, and expired on June 4, 1993. If that is so, this appeal must be dismissed as untimely filed. Pilling v. Crook County, 23 Or LUBA 51, 54 (1992); Oak Lodge Water District v. Clackamas County, 18 Or LUBA 643, 645-46 (1990).

This Board's decision in Columbia River Television v. Multnomah County, supra, on which petitioner relies, was reversed by the Oregon Supreme Court. Columbia River Television v. Multnomah County, 299 Or 325, 702 P2d 1065 (1985) (Columbia River). The supreme court explained that the definition of "final decision" in OAR 661-10-010(3) simply sets out "some minimal, required characteristics that [a] decision must contain before it will be considered by LUBA to be a final decision for purposes of review." Columbia River, 299 Or at 333. The decision on when a local government decision is final is left to the local

[2]Petitioner attaches to its response to the motion to dismiss an affidavit by a city planner. The affidavit states that on May 26, 1993, the city planner spoke to a county planner by telephone and was informed by the county planner that "the decision would become final when the commissioners passed [an] ordinance changing the zoning on [the subject] property." Response to Motion to Dismiss Exhibit 2. The affidavit further states the city planner conveyed this information to the city attorney.

government, so long as local government regulations on the subject do not conflict with applicable statutes or LUBA's rules. However, once a local government decision has become final under the local government's regulations, the procedure to obtain LUBA review is governed by ORS 197.830(8). Id. at 333-34.

There is no dispute that the May 12, 1993 decision document has the characteristics required of a final decision by OAR 661-10-010(3). LUHR (15) applies to quasi-judicial zone change proceedings. LUHR 1. In its motion to dismiss, the county interprets LUHR 15(3) to mean that a decision on a quasi-judicial zone change application becomes final when the decision maker(s) approves and signs the "Findings of Fact, Reasons and Conclusions, and Decision" document.[3] Because the county did not express an interpretation of LUHR 15(3) in the challenged decision, we are not required to defer to the county's interpretation under Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[4] However, we believe the interpretation of

[3]We note that the county acted consistently with this interpretation when it mailed the notice of decision required by ORS 197.615 after the county commissioners signed the decision document.

[4]In Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992), the court of appeals held that under Clark v. Jackson County, supra, LUBA cannot interpret local legislation in the first instance, but rather must remand a local government decision when an interpretation of local legislation is missing or inadequate for review. However, the relevant provisions of local legislation that were not interpreted in the local government decision challenged in Weeks were approval standards for the challenged decision. In contrast, here the local provision at issue

LUHR 15(3) expressed in the county's motion to dismiss is reasonable and correct. Under this interpretation, the May 12, 1993 decision document is the county's final decision on the subject zone change application.

Petitioner is correct that until the county adopted an ordinance changing its zoning maps, a change in the permissible uses of the subject property was not actually effected. However, we do not believe this prevents the May 12, 1993 decision document from being the county's final land use decision on the subject application. The LUBA decision relied on by petitioner in arguing that a final decision must affect the use of land, West v. West Linn, supra, itself relies on a LUBA decision that was reversed by the appellate courts. Medford Assembly of God v. City of Medford, 6 Or LUBA 68 (1982), rev'd 64 Or App 815 (1983), aff'd 297 Or 138 (1984). Subsequent decisions of the courts and this Board have established that a local government decision which makes a binding interpretation of its regulations, but without amending or adopting regulation provisions or granting or denying a development application, is a "final" decision, even if other actions are required to give that decision practical effect. Medford Assembly of God v. City of Medford, 297 Or 138, 140, 681 P2d 790 (1984);

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establishes when a local government decision becomes final for purposes of appellate review. We do not believe the rationale of Weeks extends to prohibiting LUBA from interpreting, in the first instance, provisions of local government regulations that bear only on the issue of when a local government decision becomes final for purposes of LUBA review.

Hollywood Neigh. Assoc. v. City of Portland, 21 Or LUBA 381, 384 (1991); General Growth v. City of Salem, 16 Or LUBA 447, 451-53 (1988).

One final point merits comment. The fact that petitioner may have relied on erroneous information from a county planner is of no import. A participant in local land use proceedings must ascertain for itself, from the local code, what it must do to protect its rights. Kamppi v. City of Salem, 21 Or LUBA 498, 505 (1991). Also, to the extent that petitioner's reference to misinformation regarding finality of the county' decision, given to petitioner by a county planner, might be construed as an attempt to raise an estoppel defense, we conclude this makes no difference in the result here. Assuming this Board has the authority to entertain arguments that a local government is estopped from applying its land use regulations in a particular situation, petitioner has not adequately alleged the elements of estoppel.[5] See Pesznecker v. City of Portland, ___ Or LUBA ____ (LUBA No. 93-027, June 15, 1993). In addition, we note

[5]In Crone v. Clackamas County, 21 Or LUBA 102, 108 (1991), we quoted the following elements of equitable estoppel as stated by the Oregon Supreme Court:

> "'[T]here must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it.' Coos County v. State of Oregon, 303 Or 173, 180-81, 743 P2d 1348 (1987) (quoting from Oregon v. Portland General Electric Co., 52 Or 502, 528, 95 P 722 (1908))."

that in Columbia River, supra, 299 Or at 329, the supreme court held that a misstatement to petitioner by a county clerk regarding when a decision was filed (and, therefore, became final) did not alter the time period for filing a notice of intent to appeal under what is now ORS 197.830(8).

In conclusion, we believe the May 12, 1993 decision document is the county's final, reviewable land use decision regarding the subject zone change application. The county provided petitioner with the notice required by ORS 197.615 on May 14, 1993. Consequently, under ORS 197.830(8) and OAR 661-10-015(1), petitioner's notice of intent to appeal was not timely filed. Respondent's motion to dismiss is granted.

This appeal is dismissed.