

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

3  
4 JERRY C. REEVES,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF WILSONVILLE,  
10 *Respondent,*

11 and

12  
13  
14 FRED MEYER, INC.,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2009-022

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from City of Wilsonville.

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24 Jerry C. Reeves, Tualatin, represented himself.

25  
26 Michael E. Kohlhoff, City Attorney, Wilsonville, represented respondent.

27  
28 Roger A. Alfred, Portland, represented intervenor-respondent.

29  
30 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,  
31 participated in the decision.

32  
33 DISMISSED

03/31/2009

34  
35 You are entitled to judicial review of this Order. Judicial review is governed by the  
36 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner appeals Ordinance 657 which approves:

“\* \* \* A STAGE 1 PRELIMINARY PLAN, STAGE 2 FINAL PLAN, SITE DESIGN PLAN, WAIVERS, A TYPE ‘C’ TREE REMOVAL PLAN, AND [A] TENTATIVE SUBDIVISION [PLAN].” Record 23.

**MOTION TO INTERVENE**

Fred Meyer, Inc., the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

**JURISDICTION**

**A. Facts**

The city and intervenor-respondent move to dismiss this appeal as untimely filed. We set out below the critical facts that are necessary to resolve the motion to dismiss.

- January 5, 2009      The city council voted to approve Ordinance 657.
- January 7, 2009      Ordinance 657 was signed by the mayor.
- January 8, 2009      Notice of Ordinance 657 was mailed to petitioner.<sup>1</sup>
- January 14, 2009     Petitioner contacted the city and was given a copy of the decision.
- January 28, 2009     Petitioner’s notice of intent to appeal (NITA) was mailed to LUBA via first class mail.
- February 2, 2009     Petitioner’s NITA was received by LUBA.

**B. Statutory and Rule Deadlines**

As relevant here, ORS 197.830(9) provides:  
“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. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall

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<sup>1</sup> Petitioner claims he never received mailed notice of Ordinance 657.

1 be filed not later than 21 days after notice of the decision sought to be  
2 reviewed is mailed or otherwise submitted to parties entitled to notice under  
3 ORS 197.615.”

4 OAR 661-010-0015(1)(a) similarly provides:

5 “The Notice [of Intent to Appeal], together with two copies, and the filing fee  
6 and deposit for costs required by section (4) of this rule, shall be filed with the  
7 Board on or before the 21st day after the date the decision sought to be  
8 reviewed becomes final or within the time provided by ORS 197.830(3)  
9 through (5). A notice of intent to appeal plan and land use regulation  
10 amendments processed pursuant to ORS 197.610 to 197.625 shall be filed  
11 with the Board on or before the 21st day after the date the decision sought to  
12 be reviewed is mailed to parties entitled to notice under ORS 197.615. A  
13 Notice filed thereafter shall not be deemed timely filed, and the appeal shall  
14 be dismissed.”

15 ORS 197.830(3) through (5) provide exceptions to the general 21-day deadline for  
16 filing a notice of intent to appeal with LUBA, which is established by ORS 197.830(9).  
17 Petitioner does not argue that any of those exceptions apply here. Therefore, under ORS  
18 197.830(9) and OAR 661-010-0015(1)(a), the 21-day deadline for filing a notice of intent to  
19 appeal began to run either on the date the decision became final or on the date notice of the  
20 appealed decision was “mailed to parties entitled to notice under ORS 197.615 \* \* \*.”

### 21 **C. Petitioner’s Arguments**

22 In its response to the city’s and intervenor-respondent’s motions to dismiss, petitioner  
23 argues several theories for why his notice of intent to appeal should be viewed as timely  
24 filed.

#### 25 **1. Failure to Mail Notice to Petitioner**

26 Without explaining why, petitioner appears to assume the challenged decision is a  
27 post-acknowledgment plan amendment and that he is a party who was entitled to notice  
28 under ORS 197.615. Petitioner disputes the city’s contention that it mailed notice to  
29 petitioner on January 8, 2009, and claims he never received mailed notice from the city.  
30 Petitioner contends he did not receive notice of Ordinance 657 until he went to the city  
31 planning department on January 14, 2009 and was given a copy of the decision at that time.

1 It is not necessary for us to resolve the parties' factual dispute about whether the city  
2 actually mailed notice to petitioner on January 8, 2009. The ORS 197.830(9) and OAR 661-  
3 010-0015(1)(a) 21-day deadline for filing a NITA only begins to run on the date the city  
4 mails notice of its decision if the decision is a post-acknowledgment plan or land use  
5 regulation amendment for which mailed notice is required under ORS 197.615. Intervenor-  
6 Respondent argues:

7 “\* \* \* The challenged approval is a quasi-judicial decision on a permit  
8 application, and not a post-acknowledgment plan or code amendment to  
9 which ORS 197.615 would apply. Therefore, under ORS 197.830(9) and  
10 OAR 661-010-0015(1)(a), the 21-day appeal period begins running on the  
11 date the decision ‘becomes final,’ rather than on the date of mailing.” Reply  
12 in Support of Motion to Dismiss 2.

13 Intervenor-respondent appears to be correct, and petitioner at no point has offered any  
14 explanation for why he believes Ordinance 657 is a post-acknowledgment comprehensive  
15 plan or land use regulation amendment. Under ORS 197.830(9) and OAR 661-010-  
16 0015(1)(a), the 21-day deadline for filing a NITA began to run on the date the city’s decision  
17 became final.

## 18 2. Failure to Provide Staff Report

19 Petitioner next argues the 21-day deadline for filing the NITA has not yet begun to  
20 run because the city failed to comply with ORS 197.763(2)(a)(A)(i), under which petitioner  
21 argues the city was required to provide a copy of the staff report in this matter at least seven  
22 days before its hearing on December 29, 2008.<sup>2</sup> Petitioner contends the city failed to do so,  
23 and that the legal consequence of that failure is that Ordinance 657 never became final.

24 Absent local law to the contrary, Ordinance 657 became final under OAR 661-010-  
25 0010(3) when it was reduced to writing and necessary signatures were added. Petitioner

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<sup>2</sup> There is no ORS 197.763(2)(a)(A)(i). We assume petitioner meant to cite ORS 197.763(3)(i) or ORS 197.763(4)(b). The former requires that a notice of a quasi-judicial land use hearing state that a staff report will be available for inspection at least seven days before the hearing. The latter requires in part that “[a]ny staff report used at the hearing shall be available at least seven days prior to the hearing.”

1 identifies no local laws that delay the date the city’s land use decisions become final. As far  
2 as we can tell, the city’s decision became final on January 7, 2009. The city may have  
3 committed one or more procedural errors in the local proceedings that preceded its adoption  
4 of Ordinance 657. If so, those procedural errors might provide a basis for reversal or  
5 remand, if there was a timely appeal of Ordinance 657.<sup>3</sup> However, any such procedural  
6 errors do not have the legal effect of preventing Ordinance 657 from becoming final or  
7 delaying the date of finality.

### 8 3. Delayed Effective Date

9 Petitioner next argues that under Wilsonville Code (WC) 2.009(9), the city’s decision  
10 did not become effective until 30 days after it was enacted on January 7, 2009.<sup>4</sup> We  
11 understand petitioner to contend that the 30-day delay in the date Ordinance 657 took *effect*,  
12 also has the effect of delaying the date Ordinance 657 became *final* for purposes of appeal to  
13 LUBA. If that 30-day delay applies to delay the date Ordinance 657 became final,  
14 petitioner’s NITA was timely filed.

15 Local laws that only delay the date an ordinance takes effect do not also delay the  
16 date those ordinance become final for purpose of appeal to LUBA. *Citizens Against*  
17 *Annexation v. City of Florence*, 55 Or LUBA 407, 419-20 (2007); *Club Wholesale v. City of*  
18 *Salem*, 19 Or LUBA 576, 578 (1990); *Hazen Investments, Inc., v. Lane County*, 2 Or LUBA

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<sup>3</sup> The city disputes petitioner’s contention that it failed comply with ORS 197.763(2)(a)(A)(i).

<sup>4</sup> As potentially relevant here, WC 2.009(9) provides:

“When ordinances shall take effect. An ordinance enacted by the Council shall take effect on  
the thirtieth day after its enactment. \* \* \*”

The city argues that the 30-day delay provided by WC 2.009(9) applies generally to city ordinances and that the more specific and controlling local law is WC 4.022(.09), which governs city council decisions in its capacity as a land use review body and makes city council decisions “effective immediately.” We need not decide here whether petitioner or the city is correct about the effective date of Ordinance 657. The date that Ordinance 657 became “final” for purposes of appeal and the date Ordinance 657 became “effective” might be the same, but they need not be.

1 151, 152 (1980). Even if WC 2.009(9) applies here, WC 2.009(9) only delays the effective  
2 date of ordinances, it says noting about when ordinances are final for purposes of appeal to  
3 LUBA. Ordinance 657 became final on January 7, 2008, notwithstanding that its effective  
4 date may have been delayed.

5 **D. Conclusion**

6 At the conclusion of petitioner's February 16, 2009 response to the city's and  
7 intervenor-respondent's motions to dismiss, petitioner asks that he be given an opportunity to  
8 respond to any replies the city or intervenor-respondent may file to reply to his February 16,  
9 2009 response. The city and intervenor-respondent filed replies on February 20, 2009 and  
10 February 24, 2009 respectively. We have delayed ruling on the motions to dismiss to  
11 provide petitioner an opportunity to respond. No response has been received.

12 For the reasons explained above, Ordinance 657 became final on January 7, 2009.  
13 The deadline for filing a NITA under ORS 197.830(9) and OAR 661-010-0015(1)(a) expired  
14 on January 28, 2009. Petitioner's NITA was mailed to LUBA on January 28, 2009. Under  
15 OAR 661-010-0015(1)(b) petitioner's notice of intent to appeal was filed when mailed,  
16 provided it was mailed by "registered or certified mail."<sup>5</sup> Petitioner's NITA was not mailed  
17 by "registered or certified mail." Therefore, petitioner's NITA was filed when it was  
18 received by LUBA on February 2, 2009. *McKnight v. City of Portland*, 48 Or LUBA 292,  
19 294-95 (2004); *Larner v. City of Portland*, 41 Or LUBA 471, 473 (2002). Petitioner's NITA  
20 was therefore not timely filed, and this appeal must be dismissed.

21 This appeal is dismissed.

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<sup>5</sup> As relevant, OAR 661-010-0015(1)(b) provides:

"The date of filing a notice of intent to appeal is the date the Notice is received by the Board, or the date the Notice is mailed, *provided it is mailed by registered or certified mail* and the party filing the Notice has proof from the post office of such mailing date. If the date of mailing is relied upon as the date of filing, acceptable proof from the post office shall consist of a receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number. \* \* \*" (Emphasis added.)