

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

3
4 LINDA F. MCGREW,
5 *Petitioner,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent.*

11
12 LUBA No. 2016-113

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from Yamhill County.

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19 Linda F. McGrew, Dayton, represented herself.

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21 Christian F. Boenisch, County Counsel, McMinnville, represented
22 respondent.

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

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27 DISMISSED 03/24/2017

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

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NATURE OF THE DECISION

This appeal concerns a “similar use” determination. “Food store[s]” and “[f]ruit or vegetable stand[s]” are permitted uses in the county’s Highway/Tourist Commercial (HC) zone. Yamhill County Zoning Ordinance (YCZO) 603.02(C) and (D). The HC zone provides that “[a]ny use not specifically listed as a permitted or conditional use in this district that is similar in character, scale and performance to the permitted use[s] specified in subsection 603.02 may be allowed as a similar use * * *.” YCZO 603.04. The board of county commissioners decision that is the subject of this appeal determines that a “marijuana dispensary” that also sells wine and tobacco is not a use that is similar to a food store or fruit or vegetable stand and therefore may not be allowed in the HC zone as a use “that is similar in character, scale and performance to the permitted use[s] specified in” the HC zone.

MOTION TO DISMISS

The county moves to dismiss this appeal, arguing that the appeal was not timely filed. There is no dispute that the board of county commissioners’ decision in this matter was reduced to writing and signed by the board of county commissioners on October 27, 2016.¹ Under ORS 197.830(9), the

¹ OAR 661-010-0010(3) provides:
“Final decision’: A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision

1 deadline for filing the notice of intent to appeal is 21 days after the appealed
2 decision became “final.”² As explained in more detail below, if the 21-day
3 deadline for filing the notice of intent to appeal is measured from October 27,
4 2016, it expired on November 17, 2016. The county’s notice of the October
5 27, 2016 decision apparently was not mailed to petitioner until one day later,
6 on October 28, 2016.³ If the 21-day deadline for filing the notice of intent to
7 appeal is measured from October 28, 2016, the 21-day deadline for filing the
8 notice of intent to appeal expired on November 18, 2016.

maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

² ORS 197.830(9) provides, in 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. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. * * *.”

Because the county’s decision is not a plan or land use regulation amendment, the first sentence of ORS 197.830(9) applies.

³ In its motion to dismiss, the county took the position that the decision was mailed to petitioner on October 27, 2016, the same day it was signed. However, petitioner provided a copy of the mailing envelope which shows it was mailed one day later, on October 28, 2016. The county has not responded further, and we will assume that the decision was mailed to petitioner on October 28, 2016.

1 LUBA received the notice of intent to appeal on November 21, 2016.
2 Under OAR 661-010-0015(1)(b), the notice of intent to appeal is filed on the
3 date it is received by LUBA unless the notice of intent to appeal “is mailed by
4 registered or certified mail,” in which case the date of mailing is the date of
5 filing.⁴ The certificate of filing attached to the notice of intent to appeal states
6 that it was mailed to LUBA by first class mail on November 17, 2016.
7 However the United States Postal Service receipt shows the notice of intent to
8 appeal was in fact mailed by certified mail on November 18, 2016, rather than
9 by first class mail on November 17, 2016. Petitioner takes the position that she
10 mailed the notice of intent to appeal at 4:58 p.m. on November 17, 2016.
11 However, under OAR 661-010-0015(1)(b) the date shown on the United States
12 Postal Service receipt is controlling. *See* n 4. The post office receipt shows the
13 notice of intent to appeal was mailed by certified mail on November 18, 2016.
14 The only question that remains to be answered is whether the decision became
15 final on October 27, 2016 (when it was reduced to writing and signed) or on

⁴ 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, the date of the receipt stamped by the United States Postal Service showing the date mailed and the certified or registered number is the date of filing.”

1 October 28, 2016 (when it was mailed to petitioner). If it was the former, the
2 appeal was filed one day late and this appeal must be dismissed. If it was the
3 latter, the appeal was timely filed and the motion to dismiss must be denied.

4 At one time the 21-day deadline for filing a notice of intent to appeal a
5 statutory permit decision did not begin to run until notice of that decision was
6 mailed to a party who was entitled to mailed notice of the decision. *League of*
7 *Women Voters v. Coos County*, 82 Or App 673, 679-81, 729 P2d 588 (1986).
8 However, in *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d
9 625 (1997), the Court of Appeals overruled *League of Women Voters v. Coos*
10 *County*. Therefore, OAR 661-010-0010(3) determines whether the appealed
11 decision became final when it was reduced to writing and signed or at some
12 later date. *See* n 1. Under that rule, the county’s decision became final on
13 October 27, 2016, “unless a local rule or ordinance specifies that the decision
14 bec[ame] final at a later date * * *.” Petitioner does not cite to anything in the
15 YCZO that delays the date of finality of a board of county commissioners’
16 decision until the date the decision is mailed or until some other later date. We
17 therefore conclude the decision became final on October 27, 2016, and that
18 date of finality was not extended by the county’s one-day delay in mailing
19 written notice to petitioner.

20 OAR 661-010-0015(1)(a) provides:

21 “The Notice [of Intent to Appeal], together with two copies, and
22 the filing fee and deposit for costs required by section (4) of this
23 rule, *shall be filed with the Board on or before the 21st day after*
24 *the date the decision sought to be reviewed becomes final or*

1 within the time provided by ORS 197.830(3)–(5). A notice of
2 intent to appeal plan and land use regulation amendments
3 processed pursuant to ORS 197.610 to 197.625 shall be filed with
4 the Board on or before the 21st day after the date the decision
5 sought to be reviewed is mailed to parties entitled to notice under
6 ORS 197.615. A Notice filed thereafter shall not be deemed timely
7 filed, and the appeal shall be dismissed.”

8 ORS 197.830(3)-(5) and ORS 197.610 to 197.625, which might delay the
9 deadline for filing a notice of intent to appeal past the date the decision was
10 reduced to writing, signed and became final, do not apply here. Petitioner does
11 not argue that they do. The 21-day deadline for filing the notice of intent to
12 appeal began to run on October 27, 2016 and expired on November 17, 2016.
13 Petitioner’s notice of intent to appeal was not filed until November 18, 2016,
14 one day after the deadline expired. Under OAR 661-010-0015(1)(a), this
15 appeal must be dismissed.⁵

16 This appeal is dismissed.

⁵ OAR 661-010-0005 provides that “the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1)” “is not a technical violation” of LUBA’s rules that may be overlooked if there is not prejudice to a party’s “substantial rights.”