

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

3  
4                   R. BRUCE TERRELL and DENISE TERRELL,  
5                                   *Petitioners,*

6  
7                                   vs.

06/04/18 PM 1:48 LUBA

8  
9                   JOSEPHINE COUNTY,  
10                                   *Respondent,*

11  
12                                   and

13  
14                   GUY SKEELE,  
15                                   *Intervenor-Respondent.*

16  
17                   LUBA No. 2018-024

18  
19                   FINAL OPINION  
20                   AND ORDER

21  
22           Appeal from Josephine County.

23  
24           H. M. Zamudio, Medford, represented petitioners.

25  
26           M. Wally Hicks, County Legal Counsel, Grants Pass, represented  
27   respondent.

28  
29           Bill Kloos, Eugene, represented intervenor-respondent.

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

33  
34                   DISMISSED                   06/04/2018

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

**NATURE OF THE DECISION**

Petitioners appeal a board of county commissioners’ decision denying petitioners’ appeal of a planning director decision approving a forest dwelling on land zoned Forest Commercial.

**MOTION TO DISMISS**

Intervenor-respondent Guy Skeelee (intervenor) moves to dismiss the appeal on the basis that the notice of intent to appeal (NITA) was not timely filed. Under ORS 197.830(9), the deadline for filing the notice of intent to appeal is 21 days after the appealed decision became “final.” *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997). The board of county commissioners’ written decision was signed on February 14, 2018. Written notice of the decision was mailed to petitioners nine days later, on February 23, 2018. Petitioners filed their NITA by certified mail on March 16, 2018.<sup>1</sup>

ORS 197.830(9) provides in part that “[a] notice of intent to appeal a land use decision \* \* \* shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final.” If the decision became final on February 14, 2018, the March 16, 2018 NITA was filed 30 days later and was

---

<sup>1</sup> Under OAR 661-010-0015(1)(b), the notice of intent to appeal is filed on the date it is received by LUBA unless the notice of intent to appeal “is mailed by registered or certified mail,” in which case the date of mailing is the date of filing.

1 not timely filed. If the decision did not become final under February 23, 2018,  
2 the March 16, 2018 NITA was filed 21 days later and was timely filed.

3 OAR 661-010-0010(3) determines whether the appealed decision  
4 became final when it was reduced to writing and signed, or at some later date:

5 “Final decision’: A decision becomes final when it is reduced to  
6 writing and bears the necessary signatures of the decision  
7 maker(s), unless a local rule or ordinance specifies that the  
8 decision becomes final at a later date, in which case the decision is  
9 considered final as provided in the local rule or ordinance.”

10 Under the rule, the county's decision became final on February 14, 2018,  
11 “unless a local rule or ordinance specifies that the decision bec[ame] final at a  
12 later date \* \* \*.”

13 Intervenor argues that the decision became final on February 14, 2018,  
14 when it was reduced to writing and signed by the board of commissioners, and  
15 that there is no “local rule or ordinance specifying that the decision bec[ame]  
16 final at a later date,” *i.e.*, the date it was mailed to petitioners. Petitioners  
17 respond that the decision became final on February 23, 2018, when it was  
18 mailed to petitioners. Petitioners argue that Josephine County Rural Land  
19 Development Code (RLDC) 31.130(C) is a local ordinance that specifies that  
20 the board of county commissioners’ decision becomes final “at a later date”  
21 than when it was reduced to writing and bore the necessary signatures. RLDC  
22 31.130(C) provides in relevant part:

23 “A quasi-judicial decision of the hearing body shall not become  
24 final until written findings of fact are prepared and approved by a  
25 majority vote of the participating members, signed by the

1           presiding officer or a designate, and mailed as required by Article  
2           33.”

3   Intervenor and the county dispute petitioners’ contention that RLDC 31.130(C)  
4   specifies that a decision of the board of commissioners become final when it is  
5   “mailed[.]” That is so, according to intervenor and the county, because the  
6   word “mailed” is modified by the phrase immediately following it: “as required  
7   by Article 33.” Intervenor and the county argue that RLDC Article 33 is  
8   completely silent about mailing notice of a board of county commissioners’  
9   decision. Put another way, we understand intervenor and the county to argue  
10   that nothing in Article 33 “requires” the decision to be mailed to anyone, and  
11   the reference to RLDC Article 33 is a reference to nothing.

12           RLDC Article 33 is the section of the county’s code that governs appeals  
13   of decisions of the planning director, hearings officer and planning commission  
14   to the board of county commissioners. Petitioners do not identify any provision  
15   in RLDC Article 33 that requires mailing of notice of a board of county  
16   commissioners’ decision.<sup>2</sup> As far as we can tell, intervenor and the county are  
17   correct that no provision included in RLDC Article 33 requires mailing of a  
18   decision of the board of county commissioners.

19           In support of their argument, petitioners rely on LUBA’s order in  
20   *Warrick v. Josephine County*, 36 Or LUBA 796 (1999). In *Warrick*, LUBA

---

<sup>2</sup> Petitioners do cite RLDC 31.140(E), which is found in RLCD Article 31, and requires notice of a board of county commissioners’ decision to be mailed to participants and to any other party requesting notice of the decision.

1 agreed with the petitioners’ argument that the decision challenged in that  
2 appeal was not final until it was mailed to the petitioners, based on “local rule.”  
3 *Id. Warrick* was a brief order with no discussion of RLDC 31.130(C), beyond  
4 quoting and citing it, and *Warrick* does not include any discussion of RLDC  
5 Article 33. For that reason, *Warrick* does not provide much assistance in the  
6 present appeal, where intervenor and the county take the position that RLDC  
7 31.130(C) does not provide that a board of county commissioners’ decision  
8 does not become final until it is mailed.

9       RLDC 31.130(C) is clearly the county’s attempt to specify the  
10 circumstances under which a decision of the board of county commissioners  
11 becomes final, including when the decision (1) includes “written findings of  
12 fact;” (2) is “signed by the presiding officer,” and (3) is “mailed as required by  
13 RLDC Article 33.” In construing the meaning of local legislation, we may not  
14 “omit what has been inserted[.]” ORS 174.010; *Bowerman v. Lane County*, 291  
15 Or App 651, 655, \_\_ P3d \_\_ (2018). Although it seems incongruous that the  
16 county would include in RLDC 31.130(C) what amounts to an illusory  
17 reference to a non-existent requirement that the decision be mailed, and the  
18 language in RLDC 31.130(C) that includes the phrase “as required by RLDC  
19 Article 33” is confusing at best, we agree with intervenor and the county that,  
20 where nothing in RLDC Article 33 requires a decision of the board of county  
21 commissioners to be mailed, the decision became final for purposes of RLDC  
22 31.130(C) and OAR 661-010-0010(3) on the date that it was reduced to writing

1 and signed.<sup>3</sup> That date was February 14, 2018. Accordingly, the NITA was not  
2 filed within the time set forth in ORS 197.830(9), and the appeal must be  
3 dismissed.

4 The appeal is dismissed.

---

<sup>3</sup> We suspect that the reference to Article 33 is a typo and that in a previous amendment to the RLDC, the county neglected to include the correct cross-reference to a notice requirement found in another RLDC section, such as RLDC 31.140(E) or RLDC 32.030(B)(2).