

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

3
4 OREGON COAST ALLIANCE
5 and BRUCE W. HADLEY,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF FLORENCE,
11 *Respondent,*

12
13 and

14
15 BENEDICK HOLDINGS LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2021-050

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of Florence.

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25 Sean T. Malone represented petitioners.

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27 Ross M. Williams represented respondent.

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29 Michael E. Farthing represented intervenor-respondent.

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31 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
32 Member, participated in the decision.

33
34 DISMISSED

10/18/2021

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 city ordinance annexing property.

JURISDICTION

Intervenor-respondent (intervenor) owns the subject property. On July 30, 2020, intervenor applied to the city for annexation and associated zoning of the subject property. On November 10, 2020, the planning commission held a public hearing on the application. On December 8, 2020, the planning commission recommended that the city council approve the application. On February 1, 2021, the city council held a public hearing on the application, which was continued to February 22, 2021.

On April 5, 2021, the city council adopted two ordinances: Ordinance No. 1, Series 2021, annexing the subject property, and Ordinance No. 2, Series 2021, applying city zoning to the subject property. On the same date, the mayor signed the written ordinances. On April 13, 2021, the planning director signed and mailed a single notice of decision for both ordinances.

On May 3, 2021, petitioners filed their notice of intent to appeal (NITA) Ordinance No. 1, Series 2021, annexing the subject property (the annexation ordinance).¹ On June 11, 2021, the city filed a motion to dismiss this appeal on

¹ On the same date, petitioners also appealed Ordinance No. 2, Series 2021, zoning the subject property, in LUBA No. 2020-051.

1 the basis that the NITA was not timely filed. On June 25, 2021, petitioners filed
2 a response. On June 30, 2021, the city filed a reply.

3 ORS 197.830(9) and OAR 661-010-0015(1)(a) provide that, absent certain
4 exceptions that do not apply here, a NITA must be filed within 21 days “after the
5 date the decision sought to be reviewed becomes final” or, if the decision is a
6 post-acknowledgment plan amendment (PAPA), within 21 days after the
7 decision sought to be reviewed or the notice thereof is “mailed.”² The city argues,
8 and petitioners do not dispute, that the annexation ordinance is not a PAPA, so

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 [a PAPA] 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.”

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

“The [NITA], together with two copies, and the filing fee and deposit for costs required by section (4) of this rule, 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 of intent to appeal [a PAPA] shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. A [NITA] filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.”

1 petitioners' NITA was due within 21 days of when the annexation ordinance
2 became final.

3 OAR 661-010-0010(3) provides:

4 "A decision becomes final when it is reduced to writing and bears
5 the necessary signatures of the decision maker(s), *unless a local rule*
6 *or ordinance specifies that the decision becomes final at a later date,*
7 *in which case the decision is considered final as provided in the*
8 *local rule or ordinance.*" (Emphasis added.)

9 Thus, a challenged decision becomes final when it is reduced to writing and
10 signed by the decision maker, unless a local rule or ordinance specifies that it
11 becomes final at a later date.

12 The city argues that the annexation ordinance became final on April 5,
13 2021, when it was signed by the mayor. Because the NITA was filed 28 days
14 later, on May 3, 2021, the city argues that the NITA was not timely filed and we
15 therefore lack jurisdiction.

16 Petitioners respond initially that the annexation ordinance did not become
17 final on April 5, 2021, and, indeed, has not become final at all. Petitioners cite
18 Florence City Code (FCC) 10-1-1-6-4(E), which provides, "A Type IV decision,
19 if approved, shall take effect and shall become final *as specified in the enacting*
20 *ordinance*, or if not approved, upon mailing of the notice of decision to the
21 applicant." (Emphasis added.) Petitioners argue that the annexation ordinance is
22 a Type IV, legislative decision and that FCC 10-1-1-6-4(E) is a local rule or
23 ordinance that specifies that the decision became final after it was signed for

1 purposes of OAR 661-010-0010(3). Petitioners cite the dictionary definition of
2 the term “specify” and argue that, because the annexation ordinance did not
3 specify a date of finality, the decision is not final. Petitioners further cite *Sanchez*
4 *v. Clatsop County*, 27 Or LUBA 713 (1994), for the proposition that, where a
5 petitioner files a NITA before a decision becomes final, the NITA will be
6 considered timely filed and the petitioner will be permitted to amend the NITA
7 to identify the correct date of finality. We understand petitioners to argue that a
8 Type IV decision like the annexation ordinance could only have become final on
9 April 5, 2021, if it expressly stated, for example, “This Ordinance is final on the
10 5th day of April, 2021.”

11 The city agrees that the annexation ordinance is a Type IV decision subject
12 to FCC 10-1-1-6-4(E). The city replies that the fact that the annexation ordinance
13 states that it was “passed and adopted on the 5th day of April, 2021,” is sufficient
14 to “specify” a date of finality for purposes of FCC 10-1-1-6-4(E). Record 3.

15 We first note that, if petitioners were correct that the ordinance is not final
16 for failure to comply with FCC 10-1-1-6-4(E), then we would lack jurisdiction
17 over this appeal. LUBA has exclusive jurisdiction to review land use decisions
18 and limited land use decisions. ORS 197.825(1). ORS 197.015(10)(a)(A) and
19 ORS 197.015(12)(a) define “land use decision” and “limited land use decision,”
20 in relevant part, as “[a] *final* decision or determination made by a local
21 government.” (Emphasis added.) If the annexation ordinance is not final for
22 failure to comply with FCC 10-1-1-6-4(E), as petitioners argue, then the

1 ordinance is not a “land use decision” or a “limited land use decision,” and we
2 lack jurisdiction.

3 However, we agree with the city that the annexation ordinance adequately
4 “specified” a date of finality for purposes of FCC 10-1-1-6-4(E). As noted, OAR
5 661-010-0010(3) provides that “[a] decision becomes final when it is reduced to
6 writing and bears the necessary signatures of the decision maker(s), unless a local
7 rule or ordinance specifies that the decision becomes final at a later date.” FCC
8 10-1-1-6-4(E) does not necessarily provide that Type IV decisions become final
9 at a date later than when they are reduced to writing and signed. Rather, it
10 provides that such decisions become final “as specified in the enacting
11 ordinance.” Regardless of when it was “passed and adopted,” the annexation
12 ordinance specifies that it was reduced to writing and signed on April 5, 2021.
13 Thus, absent some specification that it became final at a later date, the annexation
14 ordinance became final on April 5, 2021.

15 In the alternative, petitioners argue that, because intervenor applied for
16 annexation and associated zoning of the subject property in a single, consolidated
17 application and the city adopted a single set of findings to support both
18 ordinances, the ordinances were effectively consolidated and should be treated as
19 a single decision because the annexation was a necessary precursor to the
20 associated zoning. Petitioners note that the city mailed a single notice of decision
21 for both ordinances and argue that, because the ordinance applying city zoning
22 to the subject property is undisputedly a PAPA, their NITA challenging the

1 annexation ordinance was also due 21 days from April 13, 2021, the date the
2 notice was mailed, and it was therefore timely filed on May 3, 2021.

3 We disagree with petitioners that the two ordinances must necessarily be
4 considered a single decision. Although the annexation was a necessary precursor
5 to the associated zoning, the former had legal effect apart from the latter. *See Link*
6 *v. City of Florence*, 58 Or LUBA 348, 357 (2009). Petitioners have not
7 established that the ordinance annexing the subject property and the separate
8 ordinance applying city zoning to the subject property constitute a single decision
9 merely because intervenor applied for them in a single, consolidated application
10 and the city adopted a single set of findings to support both.

11 Because the annexation ordinance became final on April 5, 2021, and
12 because petitioners' NITA was filed 28 days later, on May 3, 2021, the NITA
13 was not timely filed under ORS 197.830(9) and OAR 661-010-0015(1)(a).
14 Accordingly, we lack jurisdiction.

15 The appeal is dismissed.