

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 LIFESTYLE VENTURES,

5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,

10 *Respondent.*

11
12 LUBA No. 2015-103

13 ORDER ON MOTION TO DISMISS

14 **A. Introduction**

15 Petitioner applied for a floodplain development permit. The planning
16 director denied that application, and petitioner appealed that decision to the
17 county hearings officer. In a December 3, 2015 decision, the hearings officer
18 denied petitioner’s appeal and affirmed the planning director’s decision. On
19 December 21, 2015, petitioner sent a letter to a county planner asking him to
20 request the hearings officer to reissue his decision to correct a “misstatement of
21 facts.” Clackamas County Zoning and Development Ordinance (ZDO)
22 1307.16(J).¹ At the end of that letter, petitioner stated:

¹ ZDO Chapter 13 is entitled “Administrative Action Review Process.” ZDO 1307 governs “Procedures.” ZDO 1307.16 is entitled “GENERAL PROVISIONS.” ZDO 1307.16(J) is one of 13 GENERAL PROVISIONS and authorizes a county review authority, such as the hearings officer, to reissue a decision to, among other things, correct “a misstatement of facts”:

1 “My final appeal date to LUBA is the 24th, so I need to know as
2 soon as possible so if Clackamas County denies my request I can
3 still file my appeal in a timely manner if needed with LUBA.”
4 Motion to Dismiss, Attachment 2, page 2.

5 In a December 23, 2015 letter, the hearings officer declined to reissue his
6 December 3, 2015 decision.² Petitioner mailed its notice of intent to appeal that
7 decision on December 24, 2015, by first class mail. LUBA received that notice
8 of intent to appeal on December 28, 2015. The notice of intent to appeal that
9 was filed by petitioner appears to identify two decisions as the subject of this
10 appeal.³ One of those decisions is the hearings officer’s December 3, 2015

“Reissuing a Decision: The review authority may reissue a Type I, II, or III decision as a result of a clerical error, a misstatement of facts, or the erroneous imposition or omission of conditions of approval. A decision may not be reissued after the expiration of the appeal period, if any, or after the filing of an appeal. Notice of the reissued decision shall be given in the same manner as notice of the original decision. A new appeal period equal to that of the original decision shall be provided from the date of mailing of the amended decision.”

² The hearings officer concluded that ZDO 1307.16(J) permits reissuing a decision “where the misstatement is inadvertent and is an obvious misstatement.” The hearings officer concluded that petitioner’s letter took the position that the hearings officer’s analysis was incorrect, a position that is properly presented to the Land Use Board of Appeals via an appeal rather than to the hearings officer via a request to reissue the decision. Motion to Dismiss, Attachment 3, page 2.

³ The notice of intent to appeal includes the following:

“Notice is hereby given that petitioner intends to appeal that land use decision or limited land use decision of respondent entitled [Regarding an Appeal of Planning Case File No. Z0289-15-F

1 decision denying petitioner’s appeal of the planning director decision that
2 denied petitioner’s application for a floodplain development permit. The
3 second decision is the December 23, 2015 decision by the same hearings
4 officer, which denies petitioner’s request that the hearings officer reissue his
5 December 3, 2015 decision.

6 **B. Respondent’s Motion to Dismiss**

7 The hearings officer’s December 3, 2015 decision is a Type II decision
8 under the ZDO. That decision was final and effective on the date it was issued,
9 because there was no further right of local appeal to challenge that decision.
10 ZDO 1307.16(I)(1).⁴ The deadline for filing an appeal of the December 3, 2015
11 HO decision expired 21 days later, on December 24, 2015. ORS 197.830(9);
12 OAR 661-010(1)(a).⁵

Director Decision Denying an Application for Development in the Floodplain and the subsequent Denial to Reissue the Decision in Z-028915-F, which became final on December 3, 2015 and which involves the attached/enclosed copy of the decision.”

⁴ ZDO 1307.16(I) provides, in part:

I. Effective Date of Decision: The County’s final decision on a Type I, II, or III land use permit application becomes effective on:

1. The day the final decision is issued, if no appeal at the County level is allowed[.]

⁵ As relevant, OAR 661-010-0015(1)(a) provides:

“The Notice [of Intent to Appeal], together with two copies, and the filing fee and deposit for costs required by section (4) of this

1 The county argues that because the notice of intent to appeal was not
2 mailed by “registered or certified mail,” it was filed with LUBA when LUBA
3 received the notice of intent to appeal on December 28, 2015. OAR 661-010-
4 0015(1)(b).⁶ The county argues, and we agree, that to the extent the notice of
5 intent to appeal seeks review of the hearings officer’s December 3, 2015
6 decision to deny petitioner’s appeal of the director’s floodplain permit denial, it
7 is not timely filed. However, as the county recognizes and petitioner argues, the
8 notice of intent to appeal is timely filed to the extent it seeks review of the
9 hearings officer December 23, 2015 decision denying petitioner’s request to
10 reissue his December 3, 2015 decision. That December 23, 2015 decision is
11 expressly referenced in the notice of intent to appeal. Petitioner asks that this
12 appeal be allowed to continue “as to the Hearings Officer’s decision of
13 December 23, 2015.” Opposition to Respondent’s Motion to Dismiss 3.

14 To summarize, we agree with the county that petitioner’s notice of intent
15 to appeal was not timely filed to appeal the hearings officer’s December 3,
16 2015 decision, because it was filed by first class mail only, rather than by

rule, shall be filed with [LUBA] on or before the 21st day after the
date the decision sought to be reviewed becomes final * * *.”

⁶ OAR 661-010-0015(1)(b) provides, in part:

“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. * * *”

1 registered or certified mail, and was not received until December 28, 2015.
2 However, petitioner's notice of intent to appeal was timely filed to appeal the
3 hearings officer's December 23, 2015 decision denying petitioner's request to
4 reissue his December 3, 2015 decision. Therefore, the county's motion to
5 dismiss this appeal is denied.

6 The parties apparently disagree regarding LUBA's scope of review if
7 this appeal proceeds as an appeal of the hearings officer December 23, 2015
8 decision only. We tend to agree with the county that because this appeal is
9 proceeding as an appeal of the December 23, 2015 decision only, any
10 arguments that are accurately characterized as challenges of the December 3,
11 2015 decision rather than the December 23, 2015 decision will be beyond our
12 scope of review. However, we also agree with petitioner that it is premature at
13 this point to speculate about whether the arguments that have yet to be
14 presented in petitioner's petition for review are beyond our scope of review.

15 In accordance with our January 19, 2016 Order, the county shall have 21
16 days from the date of this order to transmit the record in this appeal.

17 Dated this 8th day of February, 2016.
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23 Michael A. Holstun
24 Board Member