

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 THREE SISTERS IRRIGATION DISTRICT,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-059

18
19 ORDER

20 **MOTION TO DISMISS**

21 The challenged decision is a board of county commissioners’ decision
22 approving a conditional use permit and related applications for the construction
23 of a hydroelectric facility. The board of commissioners held a public hearing on
24 the applications on January 13, 2021. At its March 3, 2021 meeting, the board of
25 commissioners voted to approve the applications and directed staff to reduce the
26 decision to writing. On May 5, 2021, the board of commissioners signed the
27 written decision.

28 Petitioner’s Notice of Intent to Appeal (NITA) was filed on May 27, 2021.
29 On June 9, 2021, the county and intervenor-respondent (intervenor) filed a joint
30 motion to dismiss this appeal on the basis that the NITA was not timely filed. On
31 June 16, 2021, petitioner filed a response. On June 24, 2021, intervenor filed a

1 reply. On July 1, 2021, petitioner filed a surreply. We now resolve the motion to
2 dismiss.¹

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.”² The starting point in
6 determining when the challenged decision became final for purposes of an appeal
7 to LUBA is OAR 661-010-0010(3), which provides:

8 “A decision becomes final when it is reduced to writing and bears
9 the necessary signatures of the decision maker(s), *unless a local rule*
10 *or ordinance specifies that the decision becomes final at a later date,*
11 *in which case the decision is considered final as provided in the*
12 *local rule or ordinance.*” (Emphasis added.)

¹ In a previous order, we suspended all deadlines in the appeal until we resolved the motion to dismiss.

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.”

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 [NITA] filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.”

1 Thus, the challenged decision became final when it was signed by the board of
2 commissioners, unless a local rule or ordinance specifies that it became final at a
3 later date.

4 The county and intervenor argue that the challenged decision became final
5 on May 5, 2021, when it was signed by the commissioners, and that the NITA
6 was therefore filed more than 21 days after the decision became final. Petitioner
7 argues that the decision became final on May 6, 2021, and that the NITA was
8 therefore timely filed. Petitioner points to Deschutes County Code (DCC)
9 22.28.010(C), which provides, “A decision on a land use action is not final until
10 the Planning Director or Hearings Body issues a written decision, the decision or
11 notice of the decision has been mailed and the appeal period to the next higher
12 Hearings Body within the County has run.” Petitioner argues that DCC
13 22.28.010(C) is a local rule or ordinance that specifies that the decision became
14 final after it was signed for purposes of OAR 661-010-0010(3). Petitioner argues
15 that, under DCC 22.28.010(C), the decision became final when the notice of
16 decision was mailed. Because the envelope in which the notice of decision was
17 mailed to petitioner is postmarked May 6, 2021, petitioner argues that the
18 decision was mailed and therefore became final on May 6, 2021. Response to
19 Motion to Dismiss, Exs A-B.³

³ Intervenor describes the postmark on petitioner’s envelope as “illegible.” Reply to Response to Motion to Dismiss 1. However, we agree with petitioner’s response that the postmark is legible.

1 Intervenor responds that DCC 22.28.010(C) does not apply in the
2 circumstances presented here, where the final decision was made by the board of
3 commissioners and no local appeal was available.⁴ Intervenor argues that DCC
4 22.28.010(C) does not apply at all where there is no local appeal period because
5 the decision maker is the highest review body in the county and, therefore, the
6 decision becomes final under OAR 661-010-0010(3) when it is reduced to
7 writing and signed. In support of its argument, intervenor points to the language
8 of DCC 22.28.010(C), which provides that a decision is not final until (1) the
9 decision is reduced to writing, (2) the decision or notice of decision is mailed,
10 *and* (3) the local appeal period has expired.

11 We agree with petitioner that DCC 22.28.010(C) applies. Nothing in the
12 text of DCC 22.28.010(C) indicates that it applies only to decisions for which a
13 local appeal is available. DCC 22.28.010(C) applies to decisions on “land use
14 actions.” DCC 22.04.020 defines “land use action” to include, in relevant part,
15 “*any* consideration for approval of a land use permit.” (Emphasis added.) The
16 definition of “land use action” does not distinguish between decisions for which
17 a local appeal is available and decisions for which a local appeal is not available.

18 Context provided by other relevant DCC provisions also supports a
19 conclusion that DCC 22.28.010(C) is not as limited as intervenor argues. Both
20 DCC chapter 22.28 in general and DCC 22.28.010 in particular contain

⁴ The county does not join in intervenor’s reply to petitioner’s response.

1 provisions that appear to apply equally to a decision for which no local appeal is
2 available as they do to a decision for which a local appeal is available. *See* DCC
3 22.28.010(B) (“Any portion of an application not addressed in a Hearings Body’s
4 decision shall be deemed to have been denied.”); DCC 22.28.020 (“Notice of a
5 Hearings Body’s decision shall be in writing and mailed to all parties[.]”). DCC
6 chapter 22.28 does not define “Hearings Body.” However, DCC chapter 22.24,
7 which governs “Land Use Action Hearings,” provides that

8 “[t]he following shall serve as the hearings body:

9 “1. Hearings Officer.

10 “2. Planning Commission * * *.

11 “3. Board of County Commissioners * * *.” DCC 22.24.020(A).

12 This definition comports with DCC 22.28.010(C), which distinguishes between
13 the “Hearings Body” and the “Planning Director,” an individual not included in
14 the definition of “Hearings Body.” Notably, the term “Hearings Body” includes
15 the board of commissioners, which will always be the highest review body in the
16 county and for whose decisions a local appeal will never be available.

17 It is also not apparent from the plain language of DCC 22.28.010(C) why
18 the county would choose to identify a different date of finality for decisions for
19 which no local appeal is available than for decisions for which a local appeal is
20 available. We conclude that the correct interpretation of DCC 22.28.010(C) is
21 that it applies to decisions for which a local appeal is available as well as
22 decisions for which a local appeal is not available. Under DCC 22.28.010(C),

1 where a local appeal is not available, the decision becomes final when it is (1)
2 reduced to writing and (2) either the decision or a notice of decision is mailed,
3 since there is no local appeal period to delay that occurrence further.

4 Nevertheless, we understand intervenor to argue that, even if DCC
5 22.28.010(C) does apply to the board of commissioners' decision, in addition to
6 being signed on May 5, 2021, the decision was "mailed" on that date within the
7 meaning of DCC 22.28.010(C), and it therefore became final on that date. That
8 is so, intervenor argues, for two reasons.

9 First, intervenor points to a Certificate of Certified Mailing (Certificate)
10 attached to the notice of decision. The Certificate states that the notice of decision
11 was mailed on May 5, 2021. Motion to Dismiss, Ex C. As noted, the U.S. Postal
12 Service postmark on the envelope in which the notice of decision was mailed to
13 petitioner is dated May 6, 2021, and petitioner argues that the decision was
14 mailed on May 6, 2021.

15 The DCC does not define when a document is "mailed."⁵ DCC 1.04.030
16 provides:

17 "All words and phrases not specifically defined in this title or
18 elsewhere in this code shall be construed according to the common
19 and approved usage of the words or phrases. However, technical

⁵ LUBA's procedural rules provide that documents may be filed with LUBA by first class mail and that, with the exception of filing NITAs, "[i]f the date of mailing is relied upon as the date of filing, the date of the first class postmark on the envelope mailed to the Board is the date of filing." OAR 661-010-0075(2)(a)(B)(ii).

1 words and phrases and such others as may have acquired a particular
2 meaning in the law shall be construed and understood according to
3 such particular meaning.”

4 No party argues that the word “mailed” is a “technical word.” The plain, ordinary
5 meaning of the transitive verb “mail” is “to send by mail.” *Webster’s Third New*
6 *Int’l Dictionary* 1361 (unabridged ed 2002). One definition of the noun “mail,”
7 as used in the phrase “to send by mail,” is “a nation’s postal system.” *Id.* Under
8 the plain, dictionary meaning, then, the word “mailed” means to send material in
9 a postal system.

10 In a declaration attached to intervenor’s reply, a county planner explains:

11 “I contacted [the county’s third-party contract mailer] on June 21,
12 2021. A[n] * * * employee informed me that although he received
13 the mailing packet from the County on May 5, 2021, [they] in turn
14 did not process or deliver the mailing packet to the United States
15 Postal Service until May 6, 2021.” Declaration of Tarik Rawlings 3.

16 We conclude that the notice of decision was “mailed” within the meaning of DCC
17 22.28.010(C) when it was deposited with the U.S. Postal Service by the county’s
18 third party contract mailer on May 6, 2021. The county’s transfer of the notices
19 of decision to a third party contract mailer on May 5, 2021, was not sufficient to
20 deposit the notices with a postal system, the U.S. Postal Service.

21 Intervenor next argues that, even if the notice of decision was mailed to
22 petitioner’s counsel on May 6, 2021, an additional, electronic copy of the
23 decision was emailed to petitioner’s counsel on May 5, 2021. As a result of that
24 email, intervenor argues that the decision was “mailed” to petitioner within the
25 meaning of DCC 22.28.010(C) on May 5, 2021.

1 The Certificate indicates that the notice of decision was mailed by U.S.
2 Postal Service to 40 physical mailing addresses, including one for petitioner’s
3 counsel. Motion to Dismiss, Ex C at 7.⁶ We conclude that, based on the inclusion
4 of petitioner’s counsel’s physical mailing address in the Certificate, rather than
5 petitioner’s counsel’s email address, the county “mailed” the notice of decision
6 within the meaning of DCC 22.28.010(C) to petitioner on May 6, 2021. Thus, the
7 decision became final for purposes of OAR 661-010-0010(3) on May 6, 2021.

8 Because the decision became final on May 6, 2021, the NITA was timely
9 filed on May 27, 2021, under ORS 197.830(9) and OAR 661-010-0015(1)(a).
10 Accordingly, the motion to dismiss is denied.⁷

11 **RECORD**

12 In an order issued June 15, 2021, LUBA suspended all deadlines in the
13 appeal until the motion to dismiss was resolved. On June 17, 2021, LUBA
14 received the record in this appeal. Because the appeal was suspended when
15 LUBA received the record, the deadline for objecting to the record has not yet
16 expired.

⁶ The mailing list contains 43 entries; however, it indicates that the notice of decision was mailed to three of those entries by “electronic” means and does not include a mailing address for those three recipients. Motion to Dismiss, Ex D at 7-8.

⁷ On June 16, 2021, petitioner filed a motion to file a corrected NITA to reflect that the county’s decision became final on May 6, 2021. Because we agree with petitioner that the decision became final on May 6, 2021, the motion to file a corrected NITA is moot and we need not address it.

1 Any objections to the record shall be filed not later than 14 days after the
2 date of this order. If no objections to the record are filed, the petition for review
3 shall be due 21 days after the date of this order. The response briefs shall be due
4 42 days after the date of this order. The final opinion and order shall be due 77
5 days after the date of this order.

6 Dated this 9th day of August 2021.

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Melissa M. Ryan, Board Member