

1 The first sentence of ORS 197.090(2)(b) involves determining what date is the “close
2 of the period for seeking review of a land use decision.” In the present case, that involves
3 determining the last day for appealing the decision to LUBA, pursuant to ORS 197.830(9),
4 which provides:

5 “A notice of intent to appeal a land use decision * * * shall be filed not later
6 than 21 days after the date the decision sought to be reviewed becomes final.
7 A notice of intent to appeal plan and land use regulation amendments
8 processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21
9 days after notice of the decision sought to be reviewed is mailed or otherwise
10 submitted to parties entitled to notice under ORS 197.615. * * *”

11 The challenged decision is a post-acknowledgement plan amendment processed pursuant to
12 ORS 197.610 to 197.625. DLCD was entitled to notice of the challenged decision pursuant
13 to ORS 197.615(1). As applied in the present case, the “close of the period for seeking
14 review of a land use decision” under ORS 197.090(2)(b) was 21 days after the county mailed
15 notice of the decision to DLCD.

16 The second sentence of ORS 197.090(2)(b) provides that if the “land use decision
17 * * * becomes final less than 15 days before” the next LCDC meeting, the director “shall”
18 obtain approval pursuant to ORS 197.090(2)(c).¹ ORS 197.090(2)(c), in turn, allows the
19 director to file an appeal with LUBA within the period for seeking review, and then seek
20 after-the-fact approval from LCDC. If LCDC does not approve, the director must move
21 LUBA to dismiss the appeal.

¹The reference in the second sentence of ORS 197.090(2)(b) to the date the decision “becomes final” might be read to correspond to the same date the “period for seeking review” begins, for purposes of the first sentence of the statute. We can conceive of no logical reason why the legislature would intend otherwise. On the other hand, the legislature chose different words to refer to what are not necessarily the same points in time. See ORS 197.830(9) (requiring an appeal to LUBA to be filed within 21 days after the decision becomes “final,” but allowing a post-acknowledgment plan or land use regulation amendment to be appealed within 21 days after notice of the decision is mailed); ORS 197.615 (requiring local governments to mail a post-acknowledgment plan or land use regulation amendment to DLCD within five days of the “final decision.” Based on our disposition of the motion to dismiss, we need not resolve whether the first and second sentences of ORS 197.090(2)(b) can or should be construed in a manner such that the date the decision “becomes final” is the same date of the beginning of the “period for seeking review.”

1 In the present case, the Douglas County Board of Commissioners signed the
2 challenged decision on August 8, 2001, and the decision was mailed to DLCD on August 10,
3 2001. The next LCDC meeting was on August 24, 2001, at which the director did not
4 attempt to obtain approval from LCDC to appeal the decision pursuant to ORS
5 197.090(2)(b). DLCD filed its appeal of the decision with LUBA on August 31, 2001,
6 within the period prescribed by ORS 197.830(9). The director obtained approval from
7 LCDC at the subsequent meeting on September 27 and 28, 2001. The director thus obtained
8 approval pursuant to ORS 197.090(2)(c) rather than 197.090(2)(b).

9 The county contends that the decision was final when signed on August 8, 2001, and
10 therefore the director could not obtain approval under ORS 197.090(2)(c) because the
11 decision became final more than 15 days before the August 24, 2001 LCDC meeting.
12 According to respondent, the only way the director could have complied with the statute was
13 to have obtained approval pursuant to ORS 197.090(2)(b) at the August 24, 2001 meeting.

14 DLCD responds that the challenged decision did not become final until it was mailed
15 to DLCD on August 10, 2001, which was only 14 days before the next LCDC meeting on
16 August 24, 2001. DLCD contends that the finality of the decision is determined by
17 OAR 661-010-0010(3), which defines the term “final decision” for purposes of LUBA’s
18 administrative rules.² Because the challenged decision became final “less than 15 days
19 before” the next LCDC meeting, DLCD argues, the appeal was properly authorized pursuant
20 to ORS 197.090(2)(c). DLCD also argues that, even assuming the challenged decision

²OAR 661-010-0010(3) defines “final decision” as follows:

“Unless a local rule or ordinance specifies that the decision becomes final at a later time than defined in this section, a decision becomes final

“(a) When it is reduced to writing, bears the necessary signatures of the decision maker(s); and

“(b) If written notice of the decision is required by law, when written notice of the decision is mailed to persons entitled to notice.”

1 became final on August 8, 2001, more than 15 days before the next LCDC meeting, the
2 resulting failure to proceed under ORS 197.090(2)(c) rather than (b) does not affect LUBA’s
3 jurisdiction or require that LUBA dismiss an otherwise properly filed appeal.

4 The county disputes that OAR 661-010-0010(3) determines when the decision
5 became final, arguing instead that the decision became final on August 8, 2001, under the
6 terms of OAR 660-018-0040(1).³ OAR 660-018-0040(1) is part of DLCD’s rules for plan
7 and land use regulation amendment review, and requires that local governments submit the
8 adopted amendments to DLCD within five working days after the final decision, which the
9 rule states is the date the local government takes “final action.”

10 Both OAR 661-010-0010(3) and OAR 660-018-0040(1) limit their applicability to the
11 rules they relate to, and it is not clear that either rule is applicable in determining when a
12 decision “becomes final” for purposes of ORS 197.090(2)(b). We need not resolve that
13 question, because we agree with DLCD that even if the decision became final on August 8,
14 2001, and the director thus obtained approval under the wrong provision of ORS 197.090(2),
15 that action does not deprive LUBA of jurisdiction over an otherwise properly filed appeal.

16 The scope of and limitations on LUBA’s jurisdiction are set forth in ORS 197.825.
17 ORS 197.825 does not mention ORS 197.090(2), or suggest that obtaining approval under
18 the wrong procedure in ORS 197.090(2) results in loss of jurisdiction over an appeal.
19 Turning to ORS 197.090(2), we see nothing in that statute suggesting that failure of the
20 director to follow the correct procedure has jurisdictional consequences. On the contrary,
21 ORS 197.090(2) is simply directed at ensuring that the director obtains approval from LCDC

³OAR 660-018-0040(1) provides in relevant part:

“Amendments to acknowledged comprehensive plans or land use regulations, new land use regulations adopted by local government, and findings to support the adoption shall be mailed or otherwise submitted to [DLCD] within five working days after the final decision by the governing body and shall be accompanied by appropriate forms provided by [DLCD]. * * * The date of the ‘Final Decision’ as described in this rule shall be the date on which the local government takes final action on the amendment to, or adoption of, a comprehensive plan or land use regulation[.]”

1 for land use appeals, under one of two specified methods. Under the first sentence of ORS
2 197.090(2)(b), the director must seek *prior approval* from LCDC for land use appeals, if an
3 LCDC meeting is scheduled during the appeal period. The second sentence recognizes that
4 even if an LCDC meeting is scheduled within that appeal period, it may be difficult to obtain
5 prior approval and thereafter prepare and file a timely appeal. The legislature’s solution was
6 to allow *after-the-fact approval* by LCDC to continue an already-filed appeal, where the
7 decision “becomes final less than 15 days before” the meeting.

8 Regardless of whether the director should have sought and obtained prior approval
9 from LCDC before filing this appeal under ORS 197.090(2)(b) (as the county argues) or
10 properly sought and obtained after-the-fact approval (as DLCD argues), there is no dispute
11 that the director in fact has LCDC approval for this appeal. If the legislature had intended the
12 *timing* of the director’s efforts to obtain LCDC approval for an appeal under ORS 197.090(2)
13 to be jurisdictional, as the county argues, we believe the legislature would have said so.⁴
14 Under the statute, it is the *approval* of the appeal that is significant, not the *timing* of that
15 approval, or whether it is obtained under ORS 197.090(2)(b) or (2)(c). The remedy, if any,
16 for the director’s choice to seek approval under ORS 197.090(2)(c) rather than (2)(b) lies
17 with LCDC.

18 For the foregoing reasons, the county’s motion to dismiss is denied. Pursuant to the
19 parties’ stipulation, the deadline for filing the record in this case is stayed pending resolution
20 of the county’s motion to dismiss. Because that motion has been resolved, the record shall be
21 due 21 days from the date of this order.

22 Dated this 8th day of October, 2001.
23
24
25

⁴We also note that ORS 197.090(2)(d) specifically provides that “[a] decision by [LCDC] under this subsection is not subject to appeal.” If the legislature intended LCDC’s decisions to approve appeals to be unreviewable, it seems highly unlikely that the legislature intended the timing of such approvals to be jurisdictional.

1
2
3

Tod A. Bassham
Board Member