

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

3
4 PACIFIC CASCADE RESOURCES, INC.,
5 *Petitioner,*

6
7 vs.

8
9 COLUMBIA COUNTY,
10 *Respondent,*

11 and

12
13
14 MARK PECKOVER,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-147

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Columbia County.

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24 Brian D. Chenoweth and Brooks M. Foster, Portland, represented petitioner.

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26 Spencer Q. Parsons, Assistant County Counsel, St. Helens, represented respondent.

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28 Michael F. Sheehan, Scappoose, represented intervenor-respondent.

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

32
33 DISMISSED

10/25/2007

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

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2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision that approves, with conditions, petitioner's
4 application to renew a surface mining operation permit.

5 **MOTION TO INTERVENE**

6 Mark Peckover (intervenor) moves to intervene on the side of respondent. There is
7 no opposition to the motion, and it is allowed.

8 **MOTION TO DISMISS**

9 Intervenor moves to dismiss this appeal on the grounds that the notice of intent to
10 appeal was not filed within 21 days of the date that the decision sought to be reviewed
11 became final, and is thus untimely under ORS 197.830(9) and OAR 661-010-0015(1)(a).¹

12 The county board of commissioners first conducted a hearing on petitioner's renewal
13 application on December 13, 2006, and on January 31, 2007, approved the application with
14 14 conditions of approval. Record 193-95. On February 13, 2007, intervenor filed an appeal
15 of that decision, arguing that the conditions of approval are inadequate. The county board of
16 commissioners conducted a second hearing on April 14, 2007.² The commissioners
17 deliberated at a public meeting on May 2, 2007, and voted to approve the renewal application
18 with modified and additional conditions. On the same date, the commissioners signed a

¹ ORS 197.830(9) provides in relevant part that "[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." OAR 661-010-0015(1)(a) provides in relevant part that:

"The Notice, 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 or within the time provided by ORS 197.830(3) through (5). * * * A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed."

² Apparently, under the county's Surface Mining Ordinance, an appeal of a county board of commissioners' decision on a mining permit goes back to the commissioners.

1 written decision approving the application with 15 conditions of approval. No party disputes
2 that the county's decision became final on May 2, 2007.

3 The county mailed notice of the decision to petitioner on May 16, 2007. However,
4 petitioner alleges that the written notice of the decision was sent to petitioner's former
5 address in Rainier, and not to petitioner's current address in Creswell.³ After waiting several
6 weeks, petitioner's owner called the county, was informed of the decision and the mistaken
7 address, and was told that a notice of the decision would be sent to the correct address as
8 soon as possible. According to petitioner, the notice was first mailed to the correct address
9 on July 9, 2007, and received by petitioner on July 10, 2007. The notice of intent to appeal
10 was filed with LUBA 21 days later, on July 31, 2007.

11 In response to intervenor's argument that the notice of intent to appeal was not filed
12 within the deadline specified in ORS 197.830(9), petitioner argues that the notice was timely
13 filed under the deadline provided at ORS 197.830(3)(a).⁴ Under ORS 197.830(3),

14 "If * * * the local government makes a land use decision that is different from
15 the proposal described in the notice of hearing to such a degree that the notice
16 of the proposed action did not reasonably describe the local government's
17 final actions, a person adversely affected by the decision may appeal the
18 decision to [LUBA] under this section:

19 "(a) Within 21 days of actual notice where notice is required; or

20 "(b) Within 21 days of the date a person knew or should have known of the
21 decision where no notice is required."

22 According to petitioner, the notice of the hearing the county provided did not
23 reasonably describe the county's final action. Specifically, petitioner contends that the
24 notice of hearing failed to mention that the county might impose conditions of approval on

³ Intervenor disputes this allegation, citing to an affidavit from county planning staff that written notice was mailed on May 16, 2007, to both of petitioner's addresses.

⁴ Petitioner also invokes a similar provision in ORS 197.830(5), applicable to limited land use decisions. Petitioner does not explain why the challenged permit decision is a limited land use decision. Accordingly, we do not consider ORS 197.830(5).

1 petitioner's mining permit. Therefore, petitioner argues, the deadline for filing the notice of
2 intent to appeal is controlled by ORS 197.830(3), not ORS 197.830(9). Further, petitioner
3 argues that because it was entitled to notice of the county's final action, the deadline for
4 filing the notice of intent to appeal is within 21 days of "actual notice," pursuant to
5 ORS 197.830(3)(a). See *Frymark v. Tillamook County*, 45 Or LUBA 685, 697 (2003)
6 (ORS 197.830(3)(a) rather than (b) applies where the petitioner is entitled to receive written
7 notice of the final action). Because petitioner did not actually receive written notice of the
8 decision until July 10, 2007, petitioner argues, it timely filed the notice of intent to appeal
9 within 21 days of that date, on July 31, 2007.

10 We disagree with petitioner that the notice of public hearing dated March 15, 2007,
11 did not reasonably describe the local government's final action. The "notice does not
12 reasonably describe the final action" provisions of ORS 197.830(3) are triggered when
13 parties are "misled by the deviation between the notice of the proposal and the substance of
14 the decision." *Bigley v. City of Portland*, 168 Or App 508, 514, 4 P3d 741 (2000). In *Bigley*,
15 the notice of hearing on a proposed amendment to a zoo master plan specifically listed a
16 number of projects, but did not list or mention a proposal to make permanent a temporary
17 parking lot. The petitioners, who lived within view of the temporary parking lot, received
18 the notice of hearing but did not attend the hearing, and thus did not become entitled to
19 notice of the decision. Some time after the decision the petitioners learned that the decision
20 authorized converting the temporary lot to a permanent parking lot. The court read
21 ORS 197.830(3) together with ORS 197.763(3)(a), which requires that the notice of hearing
22 describe the "proposed use or uses which could be authorized," and held that the notice of
23 hearing did not reasonably describe the city's final actions:

24 "There is simply no way that a notice that made no mention of the proposed
25 action concerning the parking lot, but did specifically enumerate a myriad of
26 other actions that were embodied in the same proposal, can be said to have
27 'reasonably describe[d]' the 'final action' affecting the parking lot." *Id.*

1 None of the circumstances that led the court to conclude in *Bigley* that the notice in
2 that case did not reasonably describe the final action is present here. The county’s notice of
3 hearing states in relevant part that the county will consider the appeal of the application of
4 Pacific Cascade Resources to renew its Surface Mining Operating Permit, pursuant to the
5 approval criteria listed in the notice. Record 209. That is a fair description of the county’s
6 final action, which approves petitioner’s application to renew its mining permit under the
7 applicable criteria. Unlike the circumstances in *Bigley*, the county’s decision is not
8 “different from the proposal described in the notice,” much less different to “such a degree
9 that the notice of the proposed action did not reasonably describe” the county’s final action.

10 Further, if there is anything about the notice of hearing that “misled” petitioner in any
11 way, petitioner does not identify it. The county’s initial decision to approve the application
12 with 14 conditions of approval, which intervenor appealed, should have suggested to
13 petitioner that the county believed the applicable criteria allowed the county to impose
14 conditions of approval. Petitioner’s representatives attended the April 4, 2007 public hearing
15 before the county commissioners, and presumably attended or had the opportunity to attend
16 the commissioners’ deliberations on May 2, 2007, which resulted in a vote to approve the
17 permit subject to modified and additional conditions of approval. Petitioner cannot plausibly
18 maintain that it was surprised that the county’s final decision included conditions of
19 approval.

20 Petitioner does argue briefly that the conditions of approval “changed the nature and
21 scope of the proposed use.” Petitioner’s Response 5. However, petitioner does not explain
22 why that is the case. At Response 3, petitioner quotes four conditions requiring that
23 petitioner file an operating plan with a legal description of the mining area, that petitioner
24 maintain an access gate and fence the site, and that petitioner submit a reclamation bond. It
25 is not clear whether petitioner contends that these modified and new conditions are the
26 conditions that allegedly changed the nature and scope of the proposed use, or whether it is

1 the other 11 conditions imposed by the county’s initial and final decisions. Whatever the
2 case, petitioner makes no effort to establish that any of the 15 conditions imposed by the
3 final decision change the nature and scope of the proposed use, or in statutory terms result in
4 a decision that is “different from the proposal described in the notice.” ORS 197.830(3).

5 We reject petitioner’s apparent presumption that a notice of hearing on a permit must
6 list any conditions of approval that the local government might decide to impose following a
7 hearing on the permit, and that failure to do so means that the deadline to file an appeal of the
8 final decision is tolled under ORS 197.830(3). The “notice does not reasonably describe the
9 final action” provisions of ORS 197.830(3) are intended to operate in circumstances where
10 the petitioner is unfairly surprised by the final decision, because the nature or scope of the
11 proposed use is inadequately described in the notice or is later changed, and the petitioner
12 relied on the inadequate notice to his detriment. *See Ettro v. City of Warrenton*, 52 Or
13 LUBA 567, 580 (2006) (rejecting claims that the notice of hearing was inadequate under
14 ORS 197.830(3) because the notice did not explain that the city may defer aspects of its
15 review to later proceedings). Even assuming in the present case that the new and modified
16 conditions imposed in the May 2, 2007 decision changed the nature or scope of the proposed
17 use, which does not appear to be the case, petitioner cannot claim to be unfairly surprised or
18 to have relied on the notice of hearing to its detriment.

19 Petitioner bears the burden of establishing that this appeal is timely filed and that
20 LUBA therefore has jurisdiction over the challenged decision. For the above reasons,
21 petitioner has not established that the appeal was timely filed under ORS 197.830(3).
22 Petitioner identifies no other statutory provision or theory that might operate to toll the
23 deadline for filing the notice of intent to appeal. Accordingly, we conclude that ORS
24 197.830(9) provides the applicable deadline. Because the appeal was not filed within 21
25 days of the date the decision became final, the appeal was not timely filed.

26 The motion to dismiss is granted. This appeal is dismissed.