

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 DAVID CLEARWATERS  
5 and HOLGER SOMMER,  
6 *Petitioners,*

7  
8 and

9  
10 PHYLLIS RAY, RON RAY, HAL B. ANTHONY,  
11 DEBBIE JALLIT, DIONNE PENCILLE-HORBAN,  
12 NAOMI DAILY, SHAWN DAILY, BUZZ SMITH,  
13 NANCY SMITH, JAMES CHRISTMAN,  
14 JANENE CHRISTMAN, MARGARET SASO,  
15 KATHLEEN ARRINGTON and ROYAL ARRINGTON,  
16 *Intervenor-Petitioners,*

17  
18 vs.

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20 JOSEPHINE COUNTY,  
21 *Respondent,*

22  
23 and

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25 COPELAND SAND & GRAVEL, INC.,  
26 *Intervenor-Respondent.*

27  
28 LUBA No. 2005-152

29  
30 FINAL OPINION  
31 AND ORDER

32  
33 Appeal from Josephine County.

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35 David Clearwaters, Murphy, and Holger Sommer, Merlin, represented themselves.

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37 Phyllis Ray, Ron Ray, Hal B. Anthony, Debbie Jallit, Dionne Pencille-Horban, Naomi Daily,  
38 Shawn Daily, Buzz Smith, Nancy Smith, James Christman, Janene Christman, Margaret Saso,  
39 Kathleen Arrington and Royal Arrington, Grants Pass, represented themselves.

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41 Steven E. Rich, County Counsel, Grants Pass, represented respondent.

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43 James R. Dole, Grants Pass, represented intervenor-respondent.

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HOLSTUN, Board Member; DAVIES, Board Chair; BASSHAM, Board Member,  
participated in the decision.

DISMISSED

11/18/2005

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

**MOTIONS TO INTERVENE.**

On October 18, 2005, Copeland Sand & Gravel, Inc., the applicant below, moved to intervene on the side of respondent. No party objects to that motion, and it is allowed.

On November 1, 2005, fourteen individuals moved to intervene on the side of petitioners. No party objects to that motion, and it is allowed.

**MOTION TO EXTEND THE DEADLINE FOR FILING THE RECORD**

Respondent moves to extend the deadline for filing the record in this appeal until after LUBA resolves the pending motion to dismiss. Petitioners join in that motion, and it is allowed.

**MOTION TO DISMISS**

The challenged decision grants site plan approval for an asphalt recycling plant. Respondent moves to dismiss this appeal, arguing that petitioners’ notice of intent to appeal was not timely filed. Petitioners respond with three different theories for why they believe the motion to dismiss should be denied. After briefly describing the relevant statutes and administrative rules, we address each of those theories in turn.

**A. Introduction**

ORS 197.830(9) establishes a 21-day deadline for filing a notice of intent to appeal with LUBA.<sup>1</sup> The general rule is expressed in the first sentence of ORS 197.830(9), and under that

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<sup>1</sup> As relevant, ORS 197.830(9) provides:

“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.*” (Emphases added.)

OAR 661-010-0015 includes substantially similar language, but also notes that the 21-day deadline may begin to run at a date after the decision becomes final under ORS 197.830(3) through (5).

1 general rule the 21-day deadline begins to run on the date the decision becomes final.<sup>2</sup> Where the  
2 challenged decision is a post acknowledgment comprehensive plan or land use regulation  
3 amendment “processed pursuant to ORS 197.610 to 197.625” (commonly referred to as a  
4 PAPA), the second sentence of ORS 197.830(9) applies, and the 21-day deadline begins to run on  
5 the date the local government provides the written notice of the PAPA decision under ORS  
6 197.615.

7 Even where the first sentence of ORS 197.830(9) might otherwise apply, and make the 21-  
8 day deadline commence on the date the decision became final rather than the date the local  
9 government provided notice of the decision, commencement of the 21-day deadline for filing the  
10 notice of intent to appeal may be delayed past the date the decision becomes final in certain  
11 circumstances. One of those circumstances is set out in ORS 197.830(3), where the local  
12 government’s notice of hearing does “not reasonably describe the local government’s final actions.”  
13 ORS 197.830(3).<sup>3</sup> We first consider whether petitioners’ notice of intent to appeal was timely filed  
14 under ORS 197.830(3).

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<sup>2</sup> OAR 661-010-0010(3) provides the following definition:

“‘Final decision’: A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

<sup>3</sup> ORS 197.830(3) provides:

“If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

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

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

1           **A.     ORS 197.830(3)**

2           The relevant text of ORS 197.830(3) appears at n 3. Under ORS 197.830(3), if the  
3 county’s notice of hearing in this matter “did not reasonably describe [its] final actions,” then the 21  
4 day deadline for filing the notice of intent to appeal did not begin to run until the county provided  
5 “actual notice where notice is required,” or until petitioners “knew or should have known of the  
6 decision where no notice is required.” ORS 197.830(3). As we note below in our discussion of  
7 the parties’ arguments under ORS 197.830(9), petitioners draw a distinction between rock crushers  
8 and asphalt recovery plants. Petitioners point out that the county’s notice of hearing described the  
9 proposal as a request “[t]o operate a rap plant to crush old asphalt.” Amended Response to  
10 Motion to Dismiss, Exhibit B. Petitioners then point to the notice of decision, which describes the  
11 decision as a decision to approve “a rock crusher \* \* \* for the purpose of recycling old asphalt.”  
12 Amended Response to Motion to Dismiss, Exhibit C. Petitioners contend this difference in wording  
13 implicates ORS 197.830(3) and that their notice of intent to appeal is timely filed under subsection  
14 (b) of that statute.

15           There are a number of problems with petitioners’ argument under ORS 197.830(3)(b).  
16 First, we do not agree that the difference in wording between the notice of hearing and the notice of  
17 decision supports a conclusion that the notice of hearing did not “reasonably describe the local  
18 government’s final actions,” within the meaning of ORS 197.830(3). To the contrary, the difference  
19 in wording appears to be minor, and both notices appear to describe the same activity. The dispute  
20 below appears to have focused in part on *whether* the activity that intervenor-respondent proposed  
21 and the county approved is allowed in the Rural Industrial zone, not over any confusion about *what*  
22 was proposed or approved.

23           Even if there were material differences between the description of the proposal in the notice  
24 of hearing and the use that was actually approved, there are other requirements that petitioners must  
25 satisfy under ORS 197.830(3). Petitioners must demonstrate that they are adversely affected by  
26 the challenged decision. They make no attempt to do so. Petitioners claim that ORS

1 197.830(3)(b) applies, but petitioners do not allege that they filed the notice of intent to appeal  
2 within 21 days after they “knew or should have known of the [challenged] decision.” Petitioners do  
3 not even identify the date they first “knew or should have known of the [challenged] decision.” For  
4 these reasons, we reject petitioners’ argument that their appeal was timely filed under ORS  
5 197.830(3)(b).<sup>4</sup>

6 **B. ORS 197.830(9)**

7 The relevant text of ORS 197.830(9) is set out at n 1. As far as we can tell from the  
8 parties’ arguments, there is no dispute that the decision challenged in this appeal is site plan approval  
9 and that the decision was not “processed pursuant to ORS 197.610 to 197.625” as a PAPA.  
10 Petitioners however argue that the asphalt recovery plant that the county approved is not allowed in  
11 the applicable zone and that the county therefore *should have* adopted a PAPA to authorize  
12 asphalt recovery plants in the zone before granting the requested site plan approval.<sup>5</sup> Based on that  
13 argument, petitioners contend that the deadline for filing their notice of intent to appeal should be  
14 measured from the date the county mailed written notice of its decision, not the date the decision  
15 became final.

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<sup>4</sup> Petitioners also suggest that the challenged decision is a limited land use decision and that their appeal was timely filed under ORS 197.830(5), which provides the same delayed opportunity for appeal of limited land use decisions that ORS 197.830(3) provides for some land use decisions. Petitioners make no attempt to explain why they believe the challenged decision is a limited land use decision. As defined by ORS 197.015(12), a limited land use decision must concern land within an urban growth boundary. Because the record has not been filed, we cannot be sure whether the challenged decision concerns land within an urban growth boundary. However, it seems unlikely that the property is included in an urban growth boundary, and petitioners do not argue that it is. Even if the challenged decision were a limited land use decision, we would reject petitioners’ arguments under ORS 197.830(5) for the same reasons we rejected them under the parallel provisions in ORS 197.830(3).

<sup>5</sup> During the proceedings below, petitioners argued, in part:

“Permitted use[s] in the Rural Industrial Zones are listed in [Rural Land Development Code] RLDC 63.120. [RLDC] 63.120(G) permits ‘Cement and asphalt batching, rock processing and crushing’. However, reclaiming of asphalt pavement (RAP) is not a permitted use in this zone. It is wrong to assume that asphalt crushing and rock crushing yield comparable results. They use the same process but impacts on the environment are different \* \* \*.” Amended Response to Motion to Dismiss, Exhibit A.

1 Even if petitioner’s argument about whether the proposed use is a permitted use in the Rural  
2 Industrial Zone is meritorious, a question we need not and do not decide, it would not change the  
3 fact that the county approved a site plan and did not approve a PAPA. The statutory deadline for  
4 filing a notice of intent to appeal under ORS 197.830(9) depends on the nature of the decision the  
5 county adopted, not the nature of the decision the county should have adopted. More precisely,  
6 whether the 21-day deadline for filing a notice of intent to appeal is governed by the first or second  
7 sentence of ORS 197.830(9) depends on whether the county’s decision was “processed pursuant  
8 to ORS 197.610 to 197.625.” Petitioners do not claim that it was. The county’s decision is not  
9 governed by the second sentence of ORS 197.830(9), and we reject petitioners’ argument to the  
10 contrary.

11 **C. Condition 13**

12 The challenged decision includes a condition 13.<sup>6</sup> Even if the deadline for filing the notice of  
13 intent to appeal is governed by the first sentence of ORS 197.830(9), petitioners argue that  
14 condition 13 has the effect of delaying the date the challenged decision became final:

15 “Effectively this condition delays finalizing the decision by 30 days. During these 30  
16 days the parties were asked to mediate. Mediation was initiated September 27 (13  
17 days after the findings were signed) and concluded unsuccessfully October 6, 2005  
18 \* \* \*, at which date the decision became final. The Notice of Intent [to Appeal]  
19 was filed timely [under] OAR 661-010-0015.” Amended Response to Motion to  
20 Dismiss 5.

21 Assuming the 21-day deadline for filing a notice of intent to appeal began to run on the date  
22 the challenged decision became final, the challenged decision was reduced to writing and became  
23 final under LUBA’s rules on September 14, 2005. *See* n 2. Petitioners cite no county rule or  
24 ordinance that would cause the challenged decision to become final on a date later than September

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<sup>6</sup> Condition 13 provides:

“A mediation task force shall be established within 30 days of the signing of these findings in order to arrive at mitigation measures. \* \* \* If any of [the task force groups] or Mr. Clearwaters refuses to participate in this panel or refuses to work cooperatively to arrive at mitigation measures, this condition is null and void.”

1 14, 2005. The notice of decision that the county mailed to the parties on September 20, 2005  
2 states that the decision was dated September 14, 2005 and states that the decision may be  
3 appealed to LUBA. While the county's purpose for imposing condition 13 is not entirely clear,  
4 there is nothing in that condition that expressly or impliedly suggests that the county's site plan  
5 review approval decision was not final and appealable when it was signed on September 14, 2005.

6 We reject petitioners' argument that condition 13 operated to delay the date the challenged  
7 decision became final.

8 **D. Conclusion**

9 The deadline for filing the notice of intent to appeal in this case is established by the first  
10 sentence of ORS 197.830(9). Under that part of ORS 197.830(9), the 21-day deadline began to  
11 run on September 14, 2005, the day the county's decision was reduced to writing and signed by the  
12 board of county commissioners. OAR 661-010-0010(3). Petitioners' notice of intent to appeal  
13 was filed by certified mail 27 days later, on October 11, 2005. Under OAR 661-010-0015,  
14 petitioners' notice of intent to appeal was not timely filed and for that reason, this appeal must be  
15 dismissed.<sup>7</sup>

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<sup>7</sup> OAR 661-010-0015 provides in part that if a notice of intent to appeal is not "timely filed \* \* \* the appeal shall be dismissed."