BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NANCY GAIL MICHAELS, MERLE L. YOUNG,
RAYMOND A. DEQUINE, JOHN STOUWIE,
MARIE STOUWIE and THELMA J. O'NEAL,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

MIKE JEFFRIES,
Intervenor-Respondent.

LUBA No. 2005-138

FINAL OPINION
AND ORDER

Appeal from Douglas County.

James R. Dole, Grants Pass, filed the petition for review and argued on behalf of petitioners. With him on the brief was Cauble, Dole and Sorenson.

No appearance by Douglas County.

John M. Junkin and Krista N. Hardwick, Portland, filed the response brief and Krista N. Hardwick argued on behalf of intervenor-respondent. With them on the brief was Bullivant Houser Bailey, PC.

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

REVERSED 11/15/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a one-year extension of a conditional use permit authorizing aggregate extraction.

FACTS

We take the facts from a previous order in this appeal:

> "The following facts are not in dispute. On May 13, 1997, the county issued a conditional use permit (CUP) for aggregate removal on the subject property, then owned by E.W. and D.P. Mignot. The CUP was issued subject to a condition that the applicant obtain a permit from the Department of Geology and Mineral Industries (DOGAMI). The CUP also provided that the approval would 'become invalid without special action if the permit is not exercised within two (2) years from the date of approval' unless an extension was granted. Extensions were granted on May 17, 1999 and on June 1, 2000. On April 17, 2001, a one-year extension was granted to May 15, 2002. Intervenor's predecessor applied for an extension on June 11, 2002, almost one month after the previous extension had expired. The extension was granted on July 10, 2002. It is that July 10, 2002 extension that is the subject of this appeal. Intervenor purchased the property on March 27, 2003 and immediately took steps to obtain the necessary permits to conduct mining operations." *Michaels v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2005-138, Order on Motion to Take Evidence, slip op 2-3 (footnotes omitted).

This appeal followed.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

In the above-quoted order, we denied intervenor's motion to take evidence not in the record. Intervenor sought to submit that evidence to demonstrate that petitioners had actual notice of the county's July 10, 2002 decision more than 21 days before the notice of intent to appeal (NITA) was filed on September 22, 2005. In that order, we denied intervenor's motion because the evidence intervenor sought to introduce only applied to petitioner Michaels, not any of the other petitioners, and furthermore that evidence would not have established that petitioner Michaels had actual notice of the decision more than 21 days before the NITA was filed. Intervenor now seeks to introduce additional evidence not in the

record. That evidence consists of two letters from petitioners' attorney that allegedly demonstrate that petitioner Michaels' husband knew of the extension substantially more than 21 days before the NITA was filed. Even if the letters demonstrated what intervenor alleges, that would only impart actual knowledge to petitioner Michaels' husband who has since passed away; it would not impart knowledge to petitioner Michaels. Furthermore, as in the prior motion, the proffered evidence would have no bearing on the standing of the other petitioners.

Intervenor's motion to take evidence not in the record is denied.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal.

A. Timeliness of Appeal

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), * * * 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."

In order to bring an appeal under the provisions of ORS 197.830(3), a petitioner must be "adversely affected" by the challenged decision. Intervenor argues that petitioners are not adversely affected by the challenged decision because similar mining occurs on adjacent properties and petitioners allegedly cannot distinguish mining on intervenor's property from other mining.

All but one of the petitioners are adjacent landowners, and adjacent landowners are presumptively adversely affected. *Goddard v. Jackson County*, 34 Or LUBA 402, 409 (1998). The fact that intervenor's mining may be indistinguishable from additional mining hardly means there could be no adverse effect upon petitioners from intervenor's mining.

The cumulative effects of additional mining easily could increase the amount of noise, traffic, and dust cited by petitioners as the adverse effects caused by the mining. Petitioners are adversely affected by the decision.

Intervenor also argues that petitioners must proceed under subsection (b) of ORS 197.830(3) rather than subsection (a), because they were not entitled to notice of the decision. As we concluded in our previous unpublished order, the extension of a conditional use permit is a "permit" decision under ORS 215.402(4), and therefore petitioners were entitled to notice of the decision.[1] *Michaels v. Douglas County*, slip op 7, n 13. *See Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000) (citing *Heidgerken v. Marion County*, 35 Or LUBA 313, 326 (1998) (a discretionary decision to extend an expiring statutory permit is tantamount to a decision to reapprove the permit). ORS 197.830(3)(a) therefore provides the applicable deadline for filing the NITA. Furthermore, as we concluded in our previous order, the NITA was filed within 21 days of when petitioners received actual notice of the challenged decision. The decision was timely filed under ORS 197.830(3)(a).

B. Three Year Statute of Ultimate Repose

In his response brief, intervenor raised the issue that the NITA was not filed within the three-year statute of ultimate repose imposed by ORS 197.830(6), which provides:

> "(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in subsections (3), (4) and (5) of this section shall not exceed three years after the date of the decision.
>
> "(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

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[1] ORS 215.402(4) provides:

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. * * *"

Because the NITA was filed more than three years after the July 10, 2002 decision, unless the exception provided in ORS 197.630(6)(b) applies, we must dismiss this appeal. After oral argument, we asked the parties for further briefing on this issue in light of our recent opinion in *Kamp v. Washington County*, 51 Or LUBA 670 (2006). In construing ORS 197.830(6) in *Kamp*, we stated that the exception in subsection (b) only applies to circumstances where the local government fails to provide either (1) "notice of a hearing" on a quasi-judicial land use decision, as required by ORS 197.763 or (2) notice of an "administrative decision" on a limited land use decision, as required by ORS 197.195. *Id*. at 678.

In the present case, the challenged decision is clearly not a limited land use decision, and the county was not proceeding under ORS 197.195. The question, therefore, is whether the county failed to provide notice of hearing as required by ORS 197.763. Intervenor argues that because the county adopted what it thought was a ministerial decision it did not hold a hearing. According to intervenor, the county could not have failed to provide notice of a hearing because no hearing was conducted or required. Intervenor further argues that even if the county erroneously thought it was making a ministerial decision and was required to provide notice of its *decision* and an opportunity for a local *de novo* appeal under ORS 215.416(11)(a), under *Kamp*, failure to provide notice of such a decision does not fall within the ORS 197.830(6)(b) exception to the three-year statute of ultimate repose.

We have already concluded that the challenged decision is a "permit" within the meaning of ORS 215.402(4). *See* n 1. The county is generally required to provide at least one public hearing before making a decision concerning a statutory permit. ORS 215.416(3).[2] The only exception to the ORS 215.416(3) requirement for a public hearing is

[2] ORS 215.416(3) provides:

> "Except as provided in [ORS 215.416(11)], the hearings officer shall hold at least one public hearing on the application [for a permit].

provided by ORS 215.416(11)(a), which obviates the requirement for a prior public hearing where the county provides notice of its decision and a local right to appeal the permit decision.[3]

Turning first to intervenor's last point, the simple answer is that the county did not provide notice of its July 10, 2002 decision or a right of local appeal under ORS 215.416(11)(a). Because the county did not proceed in that manner, ORS 215.416(3) required that the county provide at least one public hearing before it approved the permit extension on July 10, 2002. *See* n 2. Turning to intervenor's first point, while it is true that the county did not provide a hearing on extending the CUP, it is also well established that a local government cannot avoid its statutory obligations by failing to observe statutorily mandated procedures. *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989); *Leonard v. Union County*, 24 Or LUBA 362, 371 (1992). In the present case, because the county made a permit decision (even though it did not realize it was doing so), it was required to provide a hearing pursuant to ORS 197.763. Because the county did not provide a hearing, it also did not provide notice of a hearing required by ORS 197.763. Therefore, under ORS 197.830(6)(b), the ORS 197.830(6)(a) three-year statute of ultimate repose does not apply.[4]

The appeal was timely filed.

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[3] ORS 215.416(11)(a) provides in part:

> "The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal."

[4] Any of intervenor's bases for dismissing the appeal that are not specifically discussed in this opinion are rejected without further discussion.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county improperly granted an extension to the CUP when the deadline for requesting an extension had already expired. Douglas County Land Use and Development Ordinance (LUDO) 3.39.300 provides:

> "An applicant may request an extension of the validity of a conditional use permit approval. Such request shall be considered a Ministerial Action and shall be submitted to the Director, prior to the expiration of such approval, in writing, stating the reason why an extension should be granted."

As discussed earlier, intervenor's predecessors received a one-year extension of the CUP that would make the CUP valid until May, 15, 2002. The county specifically advised that if the applicant was:

> "* * * not * * * able to complete the conditions for final approval by May 1[5], 2002, the tentative approval may be null and void, and any subsequent proposal for a [CUP] on this property may constitute a new Administrative action. Such new action would require a new application and associated filing fees in accordance with the land use regulations in effect at the time of the new application." Record 17.

Despite this warning and a subsequent warning, the applicant failed to request an extension until June 11, 2002, almost a month after the CUP approval had expired.

Petitioners rely on our decision in *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000), which involved a similar situation. In *Willhoft*, the city granted an extension of a CUP after the time for requesting an extension had passed. The local ordinance in *Willhoft* stated that the CUP would become "void" unless substantial construction had taken place within one year. The applicant did not begin substantial construction within the one-year period, and received a belated extension after the one-year period had run. We held that the city could not extend the CUP after it had become void. *Id*. at 397-99.

Although the ordinance at issue in the present case does not contain language declaring the CUP "void" if an extension is not obtained, we see little practical difference between the ordinances. LUDO 3.39.200 provides that the permit "will become invalid without special action if [t]he permit is not exercised within two (2) years of the date of

approval." The county itself seemed to understand that language to mean that failure to meet the conditions specified in the CUP or obtain an extension would render the CUP "null and void." Record 17. Furthermore, the challenged decision includes no interpretation of LUDO 3.39.200 and 3.39.300 and includes no explanation for how a CUP that has become "invalid" under LUDO 3.39.200 can be made valid again by an extension request that is not timely submitted under LUDO 3.39.300. The county did not file a response brief in this appeal, and the only defense on the merits provided by intervenor is that the county "waived" the deadline. Even if it is true that the county "waived" the deadline for filing for an extension of the CUP – and it certainly appears that it did – neither the decision, nor the county, nor intervenor provides any rationale or explanation as to why waiving the deadline and providing an extension after the CUP had expired was permissible. As in *Willhoft*, we hold that the CUP extension was erroneous under applicable local law.

The first assignment of error is sustained.[5]

The county's decision is reversed.

[5] In addition to the challenged decision granting an extension until 2003, the county also granted an extension the following year until 2004. Record 6. We express no opinion on what effect, if any, our decision in this appeal may have on subsequently issued extensions.