

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

3  
4 MOLLY JACOBSEN and DANA JACOBSEN,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF WINSTON,  
10 *Respondent.*

11  
12 LUBA No. 2006-072

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Winston.

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19 Jannett Wilson, Eugene, represented petitioners.

20  
21 Douglas D. Dupriest, Eugene, represented respondent.

22  
23 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
24 participated in the decision.

25  
26 DISMISSED

08/31/2007

27  
28 You are entitled to judicial review of this Order. Judicial review is governed by the  
29 provisions of ORS 197.850.

Ryan, Board Member.

**NAUTURE OF THE DECISION**

Petitioners appeal a city resolution that increases fees for permits, planning fees, park rentals, and other services.

**FACTS**

On December 19, 2005, the city adopted a resolution that increased the fees for permits, planning fees, park rentals, and other services. In particular, the city increased the land use appeal fees from \$200 to \$250 for appeals to the planning commission and to \$350 for appeals to the city council. The city provided notice for the hearing on the resolution in the local newspaper on December 16, 2005.<sup>1</sup> Petitioners did not attend the hearing on the resolution or otherwise appear in the proceedings below. Petitioners apparently learned of the decision when appealing a subsequent decision. This appeal followed.

**MOTION TO DISMISS**

The city moves to dismiss the appeal on the basis that petitioners did not appear below.<sup>2</sup> Petitioners do not dispute that they did not appear below, but they argue they timely appealed the decision under the exception to the appearance requirement of ORS 197.830(3) that provides:

“If a 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

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<sup>1</sup> Although the notice is not in the record, the city provided the notice in its Reply in Support of the Motion to Dismiss, and petitioners do not dispute that the notice was provided in the newspaper.

<sup>2</sup> ORS 197.830(2)(b) provides that a person may petition LUBA for review of a land use decision if the person:

“(b) Appeared before the local government \* \* \* orally or in writing.”

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

3           According to petitioners, the notice of the proposed action did not reasonably describe the  
4           city’s final actions.

5           The city’s decision was a legislative rather than quasi-judicial so notice by  
6           publication instead of mailing was permissible. The notice published in the newspaper under  
7           the public meetings section stated:

8           “\* \* \* Discuss resolution to update fees charged for activities, actions, and  
9           services \* \* \*.”

10          While the notice published in the newspaper is less than specific with regards to  
11          exactly what activities, actions, and services would be subject to a fee update, fees for  
12          appeals to the planning commission and city council certainly fall under that description.  
13          The ORS 197.830(3) exception is directed at notices that mislead potential appellants about  
14          the nature of the decision that is to be adopted. Although the notice in the newspaper is  
15          vague, it is not misleading. The challenged decision did in fact update fees for activities,  
16          actions, and services.

17          In *Bigley v. City of Portland*, 168 Or App 508, 4 P3d 71 (2000), the court held that a  
18          notice that described many various projects that were included as one application involving a  
19          zoo’s master plan, but did not mention making a temporary parking lot permanent, did not  
20          reasonably describe the city’s final actions. The court held that the tolling remedy of ORS  
21          197.830(3) applies to “persons who are misled by the deviation between the notice of the  
22          proposal and the substance of the decision.” *Id.* at 514. The court stated that a notice that  
23          listed numerous uses being approved but omitted the challenged aspect of the decision did  
24          not reasonably describe the city’s actions.

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

1           The present appeal differs from *Bigley* in that it does not list a number of proposed  
2 actions while omitting the disputed portion of the decision. The notice states that fees may  
3 be updated, and petitioners are now challenging an updated fee. The decision contains four  
4 pages in small print of updated fees. We do not believe the city was required to list every fee  
5 that was subject to a possible update to be listed in the newspaper. While the notice may be  
6 vague, it is not misleading. Therefore, ORS 197.830(3) does not apply and the notice of  
7 intent to appeal was not timely filed under the applicable statute, ORS 197.830(9).<sup>3</sup>

8           This appeal is dismissed.

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<sup>3</sup> 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.”