BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH STERN, TOM McCAULEY,
JOEL PERKINS and ANGEL NAVARRO,
Petitioners,

and

HOLGER T. SOMMER,
Intervenor-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

COPELAND SAND & GRAVEL, INC. and
BARLOW SAND & GRAVEL, INC.,
Intervenors-Respondents.

LUBA No. 2008-042

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Kenneth Stern, Tom McCauley, Angel Navarro, Cave Junction, and Joel Perkins, Grants Pass, represented themselves.

Holger T. Sommer, Merlin, represented himself.

Steven E. Rich, Grants Pass, represented respondent.

James R. Dole, Grants Pass, represented intervenors-respondents.

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

RYAN, Board Member, did not participate in the decision.

DISMISSED 11/19/2008

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

Opinion by Holstun.

MOTION TO INTERVENE

Holger T. Sommer, moves to intervene on the side of petitioners in this appeal. The county objects to the motion to intervene. Because of our resolution of this appeal, we need not decide the motion to intervene.

MOTION TO DISMISS

The county and intervenors-respondents move to dismiss this appeal.[1] The notice of intent to appeal (NITA) does not contain the "full title of the decision to be reviewed as it appears on the final decision" and the "date the decision to be reviewed became final" as required by our rules.[2] The NITA's entire description of the decision to be challenged states:

> "Notice is hereby given that petitioners intend to appeal the issuance and use of an agricultural Land Use Compatibility Statement by Respondent (Exhibit A) to the Little Elm Ranch, near Cave Junction, Oregon, which was subsequently used to obtain[] an aggregate mining permit from the State of Oregon." NITA 1 (underscoring in original).

---

[1] Intervenors-respondents filed a "Response to Motion to Dismiss" in which they agree with and expand upon the county's motion to dismiss. Petitioners object that intervenors-respondents' response was untimely. Intervenors-respondents' response to the county's motion to dismiss is essentially another motion to dismiss, and motions to dismiss may be filed at any time. Even if intervenors-respondents' response was untimely that would be a technical defect and absent any prejudice to petitioners' substantial rights we would consider the response. OAR 661-010-0005. We do not see any prejudice to petitioners' substantial rights, and we consider intervenors-respondents' response.

[2] OAR 661-010-0015(3) provides in pertinent part:

> "Contents of Notice: The Notice shall be substantially in the form set forth in **Exhibit 1** and shall contain:
>
> " (c) The full title of the decision to be reviewed as it appears on the final decision;
>
> "(d) The date the decision to be reviewed became final;
>
> "(e) A concise description of the decision to be reviewed, or a copy of either the notice of decision or the decision to be reviewed[.]"

The one-page Exhibit A is actually a composite of copies of parts of two pages of a U.S. Army Corps of Engineers Joint Permit Application form.[3] At the top of Exhibit A is the top portion of page one of the application form, which identifies the applicant as "Little Elm Ranch" in Central Point and includes a "received" stamp from the Oregon Division of State Lands dated July 9, 2007. The bottom of Exhibit A is a later page of the application form that was completed by the planning director for Josephine County where he checked a box indicating "[t]his project is not regulated by the comprehensive plan and land use regulations." A "Comments" section then states that "[a]gricultural Ponds & Wetland Mitigation are not regulated with Local Permits." The planning director's signature is dated June 28, 2007.

The NITA does not clearly identify the decision that petitioners are appealing. However, we understand all parties to agree that, on March 22, 2007, the county issued a land use compatibility statement (LUCS) stating that intervenors-respondents' proposal to construct an agricultural pond by excavating over 5000 cubic yards of material is consistent with the county's comprehensive plan and land use regulations. Intervenors-respondents subsequently submitted the previously mentioned U.S. Army Corps of Engineers Joint Permit Application on July 9, 2007. As discussed, that application includes a section that was completed and signed by the county planning director on June 28, 2007. Intervenor-petitioner sent a letter to the county sometime in November 2007 arguing that the activity authorized by the LUCS was mining and not an agricultural use, and therefore the LUCS should be revoked. Intervenor-petitioner's letter apparently resulted in a February 21, 2008, proceeding before the Board of County Commissioners (BCC) in which there was a one to one tie vote regarding whether to revoke the March 22, 2007 LUCS. Under applicable county law, a majority vote is required to take action and a tie vote results in no action.

[3] A copy of the joint permit application form is attached to the county's motion to dismiss.

If petitioners are attempting to appeal the BCC's action on February 21, 2008, petitioners have not explained how that action amounts to a land use decision subject to our jurisdiction. As intervenors-respondents explain, the BCC vote was a 1-1 tie in which the county took "No Action." As best we can tell, petitioners are attempting to challenge the BCC's "decision" not to revoke a previously issued LUCS. We have held that a decision not to revoke a previously issued building permit merely repeats the previously issued building permit and is not a land use decision that may be appealed to LUBA. *Johnston v. Marion County*, 51 Or LUBA 250, 262-63 (2006). We believe the same principle applies to the disputed LUCS. The BCC's February 21, 2008 "decision" was not a land use decision subject to our jurisdiction.

If petitioners seek review of the LUCS that was issued on March 22, 2007, petitioners have not explained how we have jurisdiction over a decision that was issued almost a year before the notice of intent to appeal was filed on March 10, 2008. The LUCS was signed by the planning director on March 22, 2007. Under OAR 661-010-0010(3) "[a] decision becomes final when it is reduced to writing and bears the necessary signatures of the decision makers." No one offers any reason why the LUCS would not have become final on March 22, 2007. It is possible that the March 22, 2007 LUCS was not appealed sooner because petitioners were required to exhaust available local remedies by filing a local appeal of the LUCS. *See* ORS 197.825(2)(a) (LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all [local] remedies available by right"). Petitioners, however, have not identified any local right of appeal or argued that they timely sought such a local appeal. If petitioners are seeking review of the LUCS, the appeal was not filed within 21 days after the LUCS became final, as required by OAR 661-010-0015(1)(a).

This appeal is dismissed.