

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HEREDITARY CHIEF WILBUR SLOCKISH,
5 CHIEF JOHNNY JACKSON and
6 CAROL LOGAN,
7 *Petitioners,*

8
9 vs.

10
11 OREGON DEPARTMENT OF
12 TRANSPORTATION and
13 OREGON TRANSPORTATION COMMISSION,
14 *Respondents.*

15
16 LUBA No. 2008-101

17
18 FINAL OPINION
19 AND ORDER

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21 Appeal from Oregon Department of Transportation and Oregon Transportation
22 Commission.

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24 James J. Nicita, Oregon City, represented petitioners.

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26 Bonnie E. Heitsch, Assistant Attorney General, Salem, represented respondents.

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

29
30 RYAN, Board Member, did not participate in the decision.

31
32 DISMISSED

12/29/2008

33
34 You are entitled to judicial review of this Order. Judicial review is governed by the
35 provisions of ORS 197.850.

1 Bassham, Board Chair.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an Oregon Department of Transportation (ODOT) decision that
4 combines three road projects on Highway 26 in Clackamas County.

5 **MOTION TO STRIKE**

6 Respondents move to strike petitioners' response to the motion to dismiss as untimely
7 filed. While the response to the motion to dismiss was not filed within the two weeks
8 required by our rules, such a violation is a technical error and will not result in the pleadings
9 being stricken unless another party's substantial rights are prejudiced. OAR 661-010-0005.
10 We do not see any prejudice to respondents' substantial rights, and the motion to strike
11 petitioners' response to the motion to dismiss is denied.

12 **MOTION TO DISMISS**

13 Respondents move to dismiss this appeal on numerous grounds, including that the
14 appeal was not timely filed.

15 The notice of intent to appeal (NITA) identifies the challenged decision as "the
16 approval * * * of the US 26: Wildwood to Wemme highway widening project. The project
17 name has been changed to the US 26: Salmon River Bridge – E. Lolo Pass Road Project."
18 NITA 1. As the initial name indicates, the Wildwood to Wemme highway widening project
19 involves widening a segment of US 26 near Welches to add a center turn lane. The
20 challenged decision is a single page document dated February 1, 2008, that amends the 2008-
21 2011 statewide transportation improvement program to combine that widening project with
22 two existing repaving projects in the same area.

23 The NITA was filed on July 7, 2008, more than 21 days from the date petitioners
24 allege the challenged decision became final. Respondents argue that the February 1, 2008

1 decision is not a land use decision subject to our jurisdiction.¹ In addition, respondents
2 argue, the appeal was filed more than 21 days from the date the decision became final, and is
3 therefore untimely filed under ORS 197.830(9).

4 We assume without deciding that the challenged decision is a land use decision
5 subject to our jurisdiction, as petitioners assert.² However, we agree with respondents that
6 petitioners have not met their burden of demonstrating that their appeal was timely filed.
7 Because we agree with respondents that the appeal was not timely filed, we need not address
8 respondents' other arguments in support of their motion to dismiss.

9 ORS 197.830(9) provides that a NITA must be filed with LUBA within 21 days after
10 the challenged land use decision becomes final.³ Although ORS 197.830(3) through (5) set
11 out limited exceptions to that 21-day deadline, petitioners do not argue that any of those
12 exceptions apply. Instead, petitioners argue that the 21-day deadline set out in

¹ Under ODOT's state agency coordination (SAC) program, the agency must review proposed activities which significantly affect land use for compatibility with the statewide planning goals and local comprehensive plans. See OAR chapter 731, division 015. Because federal funds will be used for the project, the National Environmental Policy Act (NEPA) applies. Pursuant to NEPA, ODOT was required to perform an environmental assessment (EA), which was done. ODOT subsequently performed a revised environmental assessment (REA). According to ODOT, the REA is the document which determines that the proposed project complies with the statewide planning goals and local comprehensive plan, and the REA is therefore the only potential "land use decision" that could be appealed to LUBA. See *Witham Parts and Equipment Co. v. ODOT*, 41 Or LUBA 588, 590-99 (2002) (describing in detail NEPA process in conjunction with SAC program and finding REA to be a land use decision subject to LUBA's jurisdiction). ODOT argues that the February 1, 2008 decision identified in the NITA is not the adoption of the REA, but is instead is simply a decision to combine the US 26: Wildwood to Wemme highway widening project with two other existing repaving projects.

² In their pleadings, petitioners appear at times to suggest that the NITA is intended to and has the effect of challenging other decisions, in addition to or instead of the February 1, 2008 decision. We reject the suggestion, and confine our analysis to the decision explicitly identified in the NITA.

³ ORS 197.830(9) provides, in relevant 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. Failure to include a certificate of mailing with the notice mailed under ORS 197.615 shall not render the notice defective. * * *"

1 ORS 197.830(9) was either met or “does not apply because of Respondent ODOT’s failure of
2 process.” Response to Motion to Strike 4.

3 Petitioners’ arguments are difficult to follow. We understand petitioners to argue that
4 the actual date that the February 1, 2008 decision became final may be later than February 1,
5 2008. Petitioners argue that on June 23, 2008, ODOT entered into a contract with a
6 construction contractor and issued a “Notice to Proceed” authorizing the contractor to begin
7 work on the project. Petitioners argue that the challenged February 1, 2008 decision to
8 combine the three road projects became “final” on June 23, 2008, which is less than 21 days
9 from the July 7, 2008 date that petitioners filed the NITA. However, petitioners have not
10 established that the February 1, 2008 decision to combine and rename the three projects
11 became “final” within the meaning of ORS 197.830(9) on the date that ODOT entered into a
12 construction contract and issued a notice to proceed to its contractor to begin the combined
13 project. Nothing in the February 1, 2008 decision indicates that it would become final at a
14 later date, and nothing in the June 23, 2008 letter to the contractor suggests that it has the
15 effect of making the February 1, 2008 decision to combine the three road projects final.

16 In the alternative, petitioners argue that the 21-day deadline to appeal the February 1,
17 2008 decision does not apply because of an alleged “failure of process.” Petitioners allege
18 that ODOT failed to provide notice of the amended project as required by ODOT’s
19 regulations and further that ODOT has refused to respond to public records requests in a
20 timely manner, among other alleged misdeeds. However, petitioners have not explained why
21 an alleged failure to provide notice as required by ODOT regulations is a basis to toll the 21-
22 day deadline at ORS 197.830(9). The second sentence of ORS 197.830(9) provides a
23 different 21-day deadline for comprehensive plan and land use regulation amendments
24 processed pursuant to ORS 197.610 to 197.625, from the date “notice of the decision sought
25 to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS
26 197.615.” However, the challenged decision is not a comprehensive plan or land use

1 regulation processed pursuant to ORS 197.610 to 197.625, and petitioners do not contend
2 otherwise. Nothing in the statute suggests that alleged failure to provide notice of a decision
3 subject to the first sentence of ORS 197.830(9) is a basis to appeal the decision more than 21
4 days from the date the decision became final. *See Wicks-Snodgrass v. City of Reedsport*,
5 148 Or App 217, 939 P2d 625 (1997) (21-day appeal period under the first sentence of
6 ORS 197.830(9) begins running on the date the decision is final, not the date notice is
7 provided).

8 Similarly, petitioners have not established that ODOT's responses to petitioners'
9 public records requests provide any basis under the first sentence of ORS 197.830(9) to
10 appeal the decision more than 21 days from the date it became final.

11 Because petitioners have not established that this appeal was timely filed, we dismiss
12 the appeal.⁴ OAR 661-010-0015(1)(a).

⁴ Due to our disposition of this appeal, petitioners' motion for summary remand is denied.