BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAN THALMAN,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

ELKHORN RESOURCE MANAGEMENT, LLC
and RICK DYER,
Intervenors-Respondents.

LUBA No. 2008-108

FINAL OPINION
AND ORDER

Appeal from Marion County.

David J. Petersen, Portland, represented petitioner.

Jane Ellen Stonecipher, County Counsel, Salem, represented respondent.

Steven L. Pfeiffer, Portland, represented intervenors-respondents.

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

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

DISMISSED 12/11/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision to extend a planned unit development conceptual plan approval.

MOTION TO INTERVENE

Elkhorn Resource Management, LLC and Rick Dyer (intervenors), the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

Intervenors originally obtained conditional use approval of a conceptual plan for a planned unit development (PUD) to develop a golf course, chapel, and commercial uses. Intervenors have obtained annual extensions of the PUD approval for many years. On November 17, 2006, intervenors obtained another extension of their PUD approval. This appeal followed.

MOTION TO DISMISS

The county moves to dismiss the appeal on the basis that the notice of intent to appeal (NITA) was not timely filed. The challenged decision was adopted on November 17, 2006. The NITA was filed July 10, 2008. In general, NITAs must be filed within 21 days of the challenged decision becoming final. ORS 197.830(9). There are exceptions to the 21-day requirement in ORS 197.830(9). The issue in this appeal is which exception applies.

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)* * * * 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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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required." (Emphasis added.)

1 The challenged decision was adopted administratively under a process in which the
2 county gave written notice of the decision in a designated notice area and provided an
3 opportunity for any aggrieved persons to appeal the decision to the county hearings officer.
4 Petitioner argues that the county made a decision without a hearing and therefore petitioner
5 was required to file his NITA "within 21 days of the date he knew or should have known of
6 the decision" under ORS 197.830(3)(b).[1] There does not appear to be any dispute that
7 petitioner filed his NITA within 21 days after learning of the decision. Therefore, if
8 petitioner is correct that ORS 197.830(3)(b) provides the applicable deadline for filing the
9 NITA then the motion to dismiss must be denied.

10 The county argues that ORS 197.830(3)(b) does not apply because the county
11 proceeded pursuant to ORS 215.416(11). According to the county, pursuant to the language
12 in ORS 197.830(3) emphasized above, ORS 197.830(3)(b) does not apply in that
13 circumstance. ORS 215.416(11) provides a process for counties to issue decisions without
14 providing a hearing as long as they provide notice of the decision to the designated notice
15 area and provide adversely affected or aggrieved person the opportunity to appeal the
16 decision. ORS 215.416(11)(a) provides:

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

23 "(B) Written notice of the decision shall be mailed to those persons
24 described in paragraph (c) of this subsection.

25 "(C) Notice under this subsection shall comply with ORS 197.763 (3)(a),
26 (c), (g) and (h) and shall describe the nature of the decision. In
27 addition, the notice shall state that any person who is adversely

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[1] Petitioner does not argue that he was entitled to notice of the decision. Therefore, ORS 197.830(3)(a) does not apply.

1 affected or aggrieved or who is entitled to written notice under
2 paragraph (c) of this subsection may appeal the decision by filing a
3 written appeal in the manner and within the time period provided in
4 the county's land use regulations. A county may not establish an
5 appeal period that is less than 12 days from the date the written notice
6 of decision required by this subsection was mailed. The notice shall
7 state that the decision will not become final until the period for filing a
8 local appeal has expired. The notice also shall state that a person who
9 is mailed written notice of the decision cannot appeal the decision
10 directly to the Land Use Board of Appeals under ORS 197.830.

11 "(D) An appeal from a hearings officer's decision made without hearing
12 under this subsection shall be to the planning commission or
13 governing body of the county. An appeal from such other person as the
14 governing body designates shall be to a hearings officer, the planning
15 commission or the governing body. In either case, the appeal shall be
16 to a de novo hearing.

17 "(E) The de novo hearing required by subparagraph (D) of this paragraph
18 shall be the initial evidentiary hearing required under ORS 197.763 as
19 the basis for an appeal to the Land Use Board of Appeals. * * *"
20 (Emphasis added.)

21 The county proceeded pursuant to Marion County Rural Zoning Ordinance
22 (MCRZO) 110.680 which implements ORS 215.416(11). There does not appear to be any
23 dispute that MCRZO 110.680 implements ORS 215.416(11) and that the county properly
24 followed the procedures in MCRZO 110.680.[2] The county argues that because the decision
25 was made "as provided under ORS 215.416(11)," ORS 197.830(3) does not apply. Instead,
26 the county argues that ORS 197.830(4) applies. ORS 197.830(4) provides:

27 "If a local government makes a land use decision without a hearing pursuant
28 to ORS 215.416 (11) or 227.175 (10):

29 "(a) A person who was not provided mailed notice of the decision as
30 required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal
31 the decision to the board under this section within 21 days of receiving
32 actual notice of the decision.

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[2] MCRZO 110.680 requires that notice of an administrative decision be mailed to the owners of property within 750 feet. Petitioner's property is not within the notice area and thus petitioner did not learn of the challenged decision until long after it had been made. Petitioner, however, resides near the main road that would access the proposed development.

1 "(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or
2 227.175 (10)(c) but who is adversely affected or aggrieved by the
3 decision may appeal the decision to the board under this section *within*
4 *21 days after the expiration of the period for filing a local appeal of*
5 *the decision established by the local government* under ORS 215.416
6 (11)(a) or 227.175 (10)(a).

7 "(c) A person who receives mailed notice of a decision made without a
8 hearing under ORS 215.416 (11) or 227.175 (10) may appeal the
9 decision to the board under this section within 21 days of receiving
10 actual notice of the nature of the decision, if the mailed notice of the
11 decision did not reasonably describe the nature of the decision.

12 "(d) Except as provided in paragraph (c) of this subsection, a person who
13 receives mailed notice of a decision made without a hearing under
14 ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the
15 board under this section." (Emphasis added.)

16 The county argues that because petitioner was not entitled to written notice under
17 MCRZO 110.680(b), which petitioner does not dispute, petitioner was required to file the
18 NITA "within 21 days after the expiration of the period for filing a local appeal of the
19 decision established by the local government." Under MCRZO 110.680(c), as required by
20 ORS 215.416(11)(a)(C), an adversely affected or aggrieved person may appeal the decision
21 to the hearings officer within 12 days of the date the decision was made. According to the
22 county, under ORS 197.830(4), the NITA was required to be filed no later than December
23 20, 2006 – long before the NITA was actually filed. Therefore, if the county is correct that
24 ORS 197.830(4) provides the applicable deadline for filing the NITA then the appeal must be
25 dismissed.

26 Petitioner does not dispute that MCRZO 110.680 implements ORS 215.416(11) or
27 that the appeal would be untimely under ORS 197.830(4). Instead, petitioner argues that
28 ORS 197.830(4) does not apply because the challenged decision was not made pursuant to
29 ORS 215.416(11). According to petitioner, decisions made pursuant to ORS 215.416(11)
30 only include land use decisions that approve or deny "an application for a permit." Petitioner

argues that the challenged decision merely extends a previously approved permit and does not approve any discretionary development of land in and of itself.

We assume without deciding that petitioner is correct that ORS 215.416(11) procedures are limited to permit decisions. However, even under that assumption, petitioner does not demonstrate that the county's decision to extend the permit is not a decision on a permit. In *Wilhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000), we considered whether the extension of a conditional use permit was a "permit" under the statutory equivalent of ORS 215.402(4) for cities and held that it was.

> "The only remaining question in determining whether the challenged decision is a 'permit,' is whether it is 'approval of a proposed development of land.' ORS 227.160(2) (1997). The April 21, 1998 decision challenged in this appeal extends a July 15, 1996 conditional use permit for a 50-space expansion of the existing RV park, which became void on July 15, 1997. In *Heidgerken v. Marion County*, 35 Or LUBA 313, 326 (1998), we explained that a discretionary decision concerning whether to grant or deny an extension of a permit for a campground 'is tantamount to a decision reapproving or denying the underlying permit' and therefore constitutes approval of a 'proposed development of land.' Similarly, here, we conclude that the challenged decision concerns an 'approval of a proposed development of land.' Because the challenged decision is 'discretionary' and approves a 'proposed development of land' under city land use regulations, it is a 'permit.'

As in *Wilhoft* and *Heidgerken*, the underlying approval that is being extended is a permit, and therefore the extension of that permit is also a permit.[3] Even if petitioner were correct that ORS 197.830(4) only applies to permit decisions, the challenged decision is a permit. ORS 197.830(4) provides the applicable deadline for filing the NITA, and petitioner filed the NITA well after that deadline.

This appeal is dismissed.

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[3] There does not appear to be any dispute that the original conditional use permit and the decision to extend the permit were discretionary.