

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

3
4 RICHARD ZIMMERLEE,
5 *Petitioner,*

6
7 vs.

8
9 CROOK COUNTY,
10 *Respondent,*

11
12 and

13
14 KNIFE RIVER CORPORATION – NORTHWEST,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-071

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Crook County.

23
24 David C. Allen represented petitioner.

25
26 John Eisler represented respondent.

27
28 Mark S. Bartholomew represented intervenor-respondent.

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30 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
31 Member, participated in the decision.

32
33 DISMISSED

10/24/2022

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

NATURE OF DECISION

Petitioner appeals the county’s approval of a conditional use permit (CUP) for intervenor-respondent’s (intervenor) aggregate mining operation.

MOTION TO DISMISS

A. Background

On July 29, 2022, petitioner filed a notice of intent to appeal (NITA) the county’s decision approving a CUP for intervenor’s aggregate mining operation. On August 9, 2022, intervenor filed a motion to dismiss the appeal as untimely.

A NITA appealing a land use decision or limited land use decision must be filed no later than 21 days after the decision sought to be reviewed becomes final. ORS 197.830(9); OAR 661-010-0015(1)(a). “A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.” OAR 661-010-0010(3). Crook County Code (CCC) 18.172.0090(3) states that a land use decision becomes final on the date the decision is reduced to writing and signed by the hearing authority.¹

¹ CCC 18.172.090(3) provides:

“The date the land use decision becomes final shall be the date the decision is reduced to writing and signed by the hearing authority or, if the hearing authority so orders, its designee.”

1 The first page of the decision states that the final decision was adopted on
2 July 6, 2022 and the last page of the county’s decision is signed and dated July
3 6, 2022. Record 6, 10. July 27, 2022 is 21 days from July 6, 2022 and the due
4 date for the NITA. The NITA was not filed until July 29, 2022. Petitioner, in their
5 response to intervenor’s motion to dismiss, provides several reasons for their late
6 filing of the NITA and argues that their right to appeal to LUBA was prejudiced
7 by actions of the county. Petitioner argues that the late appeal should be accepted
8 for the reasons set out below.

9 **B. Reasons for Late Filing**

10 **1. Legibility of Handwriting**

11 First, Petitioner argues that the handwritten date on the final decision is not
12 clear. The handwritten date is shown below:

Dated this 10th day of July, 2022.

Record 10.

14 The NITA states that the CUP decision became final on July 10, 2022. Petitioner
15 argues that they thought the above number was “10” and that the decision became
16 final on July 10, 2022. Petitioner maintains that the alleged illegibility of the date
17 unduly prejudiced them and their appeal should not be dismissed.

18 **2. Date on the Notice of Decision**

19 CCC 18.172.090(2) provides

20 “Following the signing of the land use decision made by the hearing
21 authority, the director shall cause to be issued a written notice of
22 final decision which describes the decision of the hearing authority,

1 the date of the final decision and the applicable appeal period.”

2 Petitioner argues that the notice of decision failed to include the date of the final
3 decision. The Notice of Decision does not identify the date of the final decision.
4 There is a July 7, 2022 date of mailing on the notice of decision. *See* Record 2.

5 **3. Statement of Appeal Rights in the Notice of Decision**

6 The Notice of Decision included the statement:

7 “A copy of the decision, application, all documents and evidence
8 submitted by or on behalf of the applicant and applicable criteria are
9 available for inspection at no cost and will be provided at reasonable
10 cost by contacting the Planning Department at 541-447-3211 or by
11 emailing plan@co.crook.or.us.

12 *This decision becomes final twenty-one (21) days after the date this*
13 *notice is mailed, unless appealed by a party of interest to the Land*
14 *Use Board of Appeals.”* Record 2 (emphasis added).

15 Petitioner argues that the statement in the Notice of Decision that the period to
16 appeal to LUBA is 21 days after mailing of the notice is confusing as the Notice
17 of Decision does not include the required date of the final decision and was
18 mailed on July 7, 2022.

19 **4. Failure to Mail Petitioner Notice of Decision or Final**
20 **Decision**

21 CCC 18.172.090(4) provides:

22 “The written notice of final decision shall be issued to:

23 “(a) All parties to the proceeding;

24 “(b) All persons who testified at the public hearing and those who
25 submitted written testimony; and

1 “At one time the 21-day deadline for filing a notice of intent to
2 appeal a statutory permit decision did not begin to run until notice
3 of that decision was mailed to a party who was entitled to mailed
4 notice of the decision. *League of Women Voters v. Coos County*, 82
5 Or App 673, 670-81 729 P2d 588 (1986). However, in *Wicks-*
6 *Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625, [*rev*
7 *den*, 326 Or 59, 944 P2d 949] (1997), the Court of Appeals overruled
8 *League of Women Voters v. Coos County*.” *Id.* at 249.

9 Under OAR 661-010-0010(3) the deadline to file an appeal at LUBA begins to
10 run when the decision is reduced to writing, signed, and becomes final, “unless a
11 local rule or ordinance specifies that the decision becomes final at a later date[.]”
12 The appeal in *McGrew* was filed one day late and we concluded that under OAR
13 661-010-0015(1)(a), the appeal must be dismissed. Here, the deadline to appeal
14 to LUBA expired on July 27, 2022.

15 Petitioner argues that a variety of actions by the county prejudiced its
16 ability to timely file the NITA. We conclude that the above allegations by
17 petitioner do not establish prejudice to petitioner. First, with respect to the
18 legibility of the handwritten date on the final decision, the first page of the final
19 decision stated that it was adopted on July 6, 2022. Although we understand that
20 petitioner misread the date, the above number appears to us to clearly be one
21 numeral (six) not two (a one and a zero). Further, on July 7, 2022, the county
22 issued a Notice of Decision stating that the final decision had been made. Given
23 that the Notice of Decision was dated three days *before* July 10th, July 10th is
24 not a reasonable reading of the handwritten date on the final decision.

1 With respect to the statement of appeal rights in the Notice of Decision,
2 petitioner does not explain the relevance of this contention. Although the Notice
3 of Decision incorrectly stated that the period to appeal to LUBA ran from the
4 date of the mailing of the Notice of Decision rather than the date of the Final
5 Decision, petitioner did not file their appeal within 21 days of the date of mailing
6 of the Notice of Decision, which is July 28, 2022.

7 Finally, with respect to the alleged failure of the county to mail rather than
8 email petitioner a copy of the final decision, particularly where petitioner did not
9 provide a mailing address to the county in this proceeding, petitioner does not
10 identify a requirement that the county mail rather than email him notice, state
11 when they obtained notice, or argue that they obtained notice after July 7, 2022.
12 We conclude that petitioner was not prejudiced by the county's actions.

13 Moreover, even if prejudice did occur, for the reasons set out above, such
14 prejudice does not relieve petitioner from the obligation to timely file the NITA.

15 The appeal is dismissed.