BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEFFREY WRIGHT and REBECCA WRIGHT,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

STANLEY KLOPFENSTEIN and DONALD W. ZERKEL,
Intervenors-Respondents.

LUBA No. 2010-088

ORDER

MOTIONS TO INTERVENE

Stanley Klopfenstein and Donald W. Zerkel move to intervene on the side of respondent. No party opposes the motions and they are granted.

FACTS

We take the facts from the parties' pleadings.[1] The challenged decision is the county planning director's approval of an application for a variance to allow a 120-foot tall wind turbine on a 35-acre property near Silverton, Oregon that is zoned Exclusive Farm Use (EFU).[2] Intervenors submitted an application for a variance to the height limit for a tower to be located on the subject property (tax lot 100), and that application was given a planning department file number of "10-007." According to petitioners, different parties with the same last name of intervenor Klopfenstein also filed an application for a variance to the

[1] We previously granted the county's motion to suspend the deadline for transmitting the record in this appeal pending our resolution of intervenors' motion to dismiss.

[2] The EFU zone ordinarily limits the height of structures to 35 feet.

EFU-zone height limits for other EFU-zoned property located near Salem on the same date as the application in planning file no. 10-007 was filed, and that application was given a planning department file no. 10-008. The planning director approved both of the applications on July 20, 2010.[3]

Petitioners' property borders the subject property on its western boundary and their residence is located close to that boundary. Petitioners received notice of the July 20, 2010 decision approving the variance to allow a 120-foot tall wind turbine on tax lot 100. That notice included a copy of the entire written decision. The decision described the location of the turbine as "near the center of the property," "1180 feet from the western property line," and concluded that that location "should not interfere with existing farm accessory buildings or residences in the area. * * *."[4] Petitioners' Response to Motion to Dismiss, Exhibit 2, page 4. Petitioners maintain that the notice of decision did not include a copy of the site plan that was submitted as part of the application and that is included as part of Exhibit 1 to Intervenors' Motion to Dismiss. That site plan shows the location of the wind turbine approximately 190 feet from the boundary between petitioners' and intervenors' property and not "near the center of the property * * *" as the text of the decision describes.

According to petitioners, on September 16, 2010, petitioners saw intervenors' contractors excavating the subject property in a location close to the boundary line between

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[3] The challenged decision states that "[t]he wind turbine is considered an accessory structure to the primary use (farming) of the subject parcel." Petitioners' Response to Motion to Dismiss, Exhibit 2 page 2.

[4] The decision contains the following finding:

> "13. The location of the proposed wind turbine is *near the center of the property* and should not interfere with existing farm accessory buildings or residences in the area. According to the submitted site plan, the wind turbine would be placed approximately 1380 feet from the southern property line of the subject parcel, 270 feet from the northern, 430 feet from the eastern *and 1180 feet from the western property line*. * * * The property is surrounded by land predominately in small farm use, and the location isolates the wind turbine from other uses and residential structures in the vicinity. There is no evidence that the proposal will have an adverse effect on property or the health and safety of persons in the vicinity. * * *" (Emphases added.)

petitioners' and intervenors' properties in preparation for siting the tower in that location, and through discussions with intervenor Klopfenstein, learned that the excavation site was where the turbine was going to be built. Sometime after September 16, 2010, petitioners also contacted county planning staff to further investigate the location of the turbine. According to petitioners, county planning staff informed petitioners that the description of the location of the turbine for the decision on planning file no. 10-007 mistakenly described the proposed location of the turbine for the application assigned planning file no. 10-008, the application referred to above that was filed on the same day as the application in planning file no. 10-007, albeit by other Klopfensteins and for an entirely different property close to Salem. On October 6, 2010, almost two and one-half months after they received notice of the decision in planning file no. 10-007, petitioners filed their Notice of Intent to Appeal (NITA) that decision with LUBA.[5]

MOTION TO DISMISS

Intervenors move to dismiss this appeal, on the ground that petitioners' notice was filed more than 21 days after the date the county's decision became final. OAR 661-010-0015(1)(a). As relevant here, ORS 197.830(9) requires that a notice of intent to appeal a land use decision to LUBA be filed no later than 21 days after the date the decision becomes final. However, ORS 197.830(4) provides alternative appeal deadlines that apply where the county makes a decision without a hearing pursuant to ORS 215.416(11).[6] ORS 197.830(4)

[5] Petitioners also attempted to file a local appeal of the planning director's decision on that same date, but that appeal was rejected.

[6] ORS 215.416(11)(a) provides:

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

provides in relevant part:

> "(4) If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
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> " * * * * *
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> "(c) A person who receives mailed notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the mailed notice of the decision did not reasonably describe the nature of the decision."

Thus in order for petitioners to file their appeal outside of the 21-day deadline provided in ORS 197.830(9), petitioners must demonstrate that (1) the mailed notice of the decision did not reasonably describe the nature of the decision, and (2) that petitioners filed their appeal within 21 days of receiving actual notice of the nature of the decision.

A. The "Nature of the Decision"

Intervenors maintain that the mailed notice of the decision reasonably described the "the nature of the decision" as those words are used in ORS 197.830(4)(c). The nature of the decision, according to intervenors, is a decision on a variance to the height limits in the EFU zone. Intervenors argue that the location of the proposed turbine for which the variance is

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> "(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.
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> "(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830."

ORS 215.402(4) defines permit to mean, as relevant "discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto."

sought has no bearing on the decision to approve a variance to the height limits and thus the location of the turbine should not be considered to be a part of the "nature of the decision."

Petitioners contend that the "mailed notice of the decision did not reasonably describe the nature of the decision." According to petitioners, the "nature of the decision" is the county's decision to approve a variance to allow a 120-foot tall wind turbine in the location sought by intervenors in their application, approximately 190 feet from petitioners' property and in close proximity to their residence. According to petitioners, the mailed notice did not reasonably describe that decision where the mailed notice described the effects of a wind turbine "near the center of the property" and approximately "1180 feet from the western boundary."

We disagree with intervenors that the "nature of the decision" is limited to the parts of the decision that discuss the height of the turbine. We agree with petitioners that where the relevant approval criteria require evaluation of the adverse effects of the variance on the neighborhood and neighboring residences, the location of the proposed turbine is an integral part of the "nature of the decision."

We know of no cases applying the ORS 197.830(4)(c) exception to the 21-day deadline for filing an appeal, based on an argument that the notice of a decision made without a hearing under ORS 215.416(11) did "not reasonably describe the nature of the decision." However, *Bigley v. City of Portland*, 168 Or App 508, 514, 4 P3d 741 (2000) is instructive. *Bigley* involved an appeal that was filed more than 21 days after the decision became final under ORS 197.830(3) by parties who argued that the notice of the hearing that they received misled them because the notice did not mention that part of the proposal that was eventually adopted by the city was to make a temporary parking lot that was visible from the petitioners' property a permanent parking lot.[7] The Court of Appeals allowed the

[7] ORS 197.830(3) sets out separate deadlines for appeals of decisions made without a hearing but that are not decisions made under ORS 215.416(11) and for decisions made after a hearing:

alternative appeal deadlines set out in ORS 197.830(3) to apply because it concluded that the petitioners were "misled" by differences between the proposal described in a notice of hearing and the proposal that was eventually approved, so that the "notice of the proposed action did not reasonably describe the local government's final actions" as required by ORS 197.830(3). *Id*. at 514. Similarly, we think that where a notice of decision misleads a party due to differences between the decision as described in the notice of decision and what the decision actually approves, the alternative appeal deadlines set out in ORS 197.830(4)(c) may apply.

The peculiar circumstances of this appeal do not lend themselves to easy resolution of the motion to dismiss, in part because the "notice of decision" consisted of a copy of at least portions of the decision itself. Petitioners' argument that they were misled by the notice of decision assumes that some portion of the decision approved a wind turbine in the location approximately 190 feet from petitioners' property. However, in the copy of the decision attached to the parties' pleadings, the only written description of the location of the turbine at all in the decision is the description found in Finding 13 as "near the center of the property." *See* n 4. Petitioners apparently base their assumption that the decision approved the turbine in the location currently being built on conversations with the county's planning staff that occurred after petitioners noticed construction occurring on intervenors' property. According to petitioners, the county planner stated that "approval of [the] variance

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> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the 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 [LUBA] under this section:
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> "(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."

application was made according to the site plan actually submitted in connection with [the] application." Petitioners' Affidavit 3. Based on that understanding of the nature of the decision, petitioners argue that they were misled by the notice of decision's description of the location of the turbine as "near the center of the property" and by the county's conclusion based on that location that the turbine would not have significant adverse effects on neighboring residences, because the notice of decision did not include a copy of the site plan.

Intervenors, on the other hand, maintain that "[l]ocating the wind turbine within a particular specific site was not a condition of approval." Motion to Dismiss 6. While intervenors' statement is factually accurate, it does not reflect the reality that the county was required to and did make findings regarding the impact of the turbine on neighboring and surrounding properties based on its location described in Finding No. 13 "near the center of the property." Nor does it explain intervenors' or the county's understanding of the importance, if any, to the decision itself of the site plan attached to the Motion to Dismiss. If in fact the decision approved the turbine in the location shown on the site plan that is attached to intervenors' Motion to Dismiss, then the county's failure to include that site plan in the notice of decision it mailed to petitioners likely had the effect of misleading petitioners in the ways described above, making the notice of intent to appeal timely filed under ORS 197.830(3). If on the other hand the decision approved the turbine in the location described in Finding No. 13, then petitioners could not have been misled because the notice of decision accurately described that location. If we ultimately determine that to be the case, we would likely grant a renewed motion to dismiss the appeal.[8]

Accordingly, based on the pleadings and documents provided by the parties to us at this point, and given the lack of clarity regarding what the decision actually approved and the significance, if any, the site plan has on the answer to that question, we agree with petitioners

[8] Of course, that would also mean that the turbine has been constructed at a different location than authorized in the decision.

that the mailed notice of the decision did not "reasonably describe the nature of the decision" under ORS 197.830(4)(c).

B. "Actual Notice of the Nature of the Decision"

Intervenors also maintain that petitioners failed to file their NITA within 21 days of receiving "actual notice of the nature of the decision." According to intervenors, the proposed location of the turbine close to petitioners' property line and residence was flagged in February, 2010, and intervenors and petitioners discussed the proposed location of the turbine at that time. Intervenors maintain that the flags and the verbal communication of the proposed location provided "actual notice of the nature of the decision" to petitioners well before September 16, 2010, the date that petitioners allege they received actual notice of the nature of the decision. Petitioners respond that they timely filed their NITA because they have yet to receive "actual notice of the nature of the decision" where the decision so inaccurately describes the location of the turbine. In the alternative, petitioners argue that they timely filed their notice of intent to appeal within 21 days after they first learned of the "nature of the decision" when they observed site excavation preparations for the turbine in the location proposed by intervenors approximately 190 feet from their property line.

We agree with petitioners. First, intervenors' argument boils down to a contention that petitioners had subjective or constructive notice of the location of the turbine in February, 2010 when stakes were placed in the ground. However, like ORS 197.830(3)(a), the ORS 197.830(4)(c) 21-day deadline begins to run upon "actual notice," rather than on the date the petitioners "should have known of the decision," as provided in ORS 197.830(3)(b). *See* n 7. Second, we have held that, at least as used in ORS 197.830(3)(a), "actual notice" means the equivalent of written notice of the decision or a copy of the decision itself for persons who are entitled to actual notice. *Frymark v. Tillamook County*, 45 Or LUBA 685, 696-98 (2003). While petitioners received a copy of the decision sometime in July or August, as we have explained above the decision did not reasonably

describe the nature of the decision because it incorrectly described the location where the approved turbine was to be constructed. Petitioners did not have "actual notice" of the nature of the decision until after September 16, 2010, when they contacted planning staff and learned of the site plan that the county apparently believes authorized the location of the tower close to their property boundary. Accordingly, petitioners' appeal is timely.

Intervenors' motion to dismiss is denied.

RECORD

The county shall transmit the record in accordance with OAR 661-010-0025(2) within 21 days of the date of this order.

Dated this 17th day of December, 2010.

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Melissa M. Ryan
Board Member