BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WALTER MINER, DEBRA MINER, TIMOTHY J. BISH, STEVE McGRORTY, CINDY McGRORTY, NANCY BREWER, JAMES LINDROS, MARION LINDROS, JEANNE TUCKER, KEN YEAGER, ROBERT H. TIKKALA, CAROL J. TIKKALA, NORMAN L. SHATTO, JUDITH ANN SHATTO, WADE GUSTAFSON, MARY ELLEN GUSTAFSON, F. ANDREW BURNS, ANGEL BURNS, MARVIN HUGHES and DORIS HUGHES,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent,

and

MILES CROSSING SANITARY SEWER DISTRICT,
Intervenor-Respondent.

LUBA No. 2003-127

FINAL OPINION AND ORDER

Appeal from Clatsop County.

Andrew H. Stamp, Portland, represented petitioners.

Heather L. Reynolds, County Counsel, Astoria, represented respondent.

W. Louis Larson, Astoria, and William K. Kabeiseman, Portland, represented intervenor-respondent.

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

DISMISSED 02/24/2004

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county resolution and order annexing territory into a sewer district.

FACTS

Miles Crossing Sanitary Sewer District (sewer district or intervenor) applied for a grant to improve sewer facilities to better serve low-income residents.[1] In order to make the services less expensive on a per hook-up basis, the district proposed to expand its boundaries to encompass several residential areas located in proximity to existing sewer facilities. The expansion of the sewer lines, however, would encroach onto exclusive farm use (EFU) land, in violation of Goal 11 (Public Facilities) and administrative rules which prohibit the expansion of sewer lines onto resource lands. The county, therefore, adopted an exception to Goals 3 (Agricultural Lands) and 4 (Forest Lands), designated the area Rural Community in its comprehensive plan, and assigned properties within the plan area to one of the four zoning designations established in the community plan. These amendments were adopted in December 2002, and are not at issue in this appeal.

In March 2003, the Board of County Commissioners (BCC) adopted a resolution annexing five territories to the district, in response to a petition for annexation filed pursuant to ORS 198.855(3).[2] The five territories encompass most of the area within the community plan boundaries that had not been previously included within the district. That annexation resolution, more

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[1] The Miles Crossing Sanitary Sewer District is not located within a city urban growth boundary.

[2] ORS 198.855(3) provides:

> "If [an] annexation petition is signed by all of the owners of all land in the territory proposed to be annexed or is signed by a majority of the electors registered in the territory proposed to be annexed and by the owners of more than half of the land in the territory, an election in the territory and district shall be dispensed with. After the hearing on the petition, if the county board approves the petition as presented or as modified or, if an election is held, if the electors approve the annexation, the county board shall enter an order describing the boundaries of the territory annexed and declaring it annexed to the district."

The parties dispute whether the petition for annexation actually complied with the signature provisions of ORS 198.855(3). However, we need not and do not resolve that dispute in this decision.

specifically, the annexation of residential land located within Territory 4, is at issue in this appeal. In May 2003, the county adopted amendments to the March 2003 resolution, amending the property description of Territory 4, to exclude certain territory from the district boundaries. In August 2003, petitioners, who own property within Territory 4 filed their notice of intent to appeal the March 2003 decision.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal on three grounds: (1) the decision is not a land use decision; (2) the decision is moot; and (3) the notice of intent to appeal was not timely filed.

A. Land Use Decision

Intervenor argues that LUBA does not have jurisdiction to review this matter because the county's decision to approve the annexation is not a "land use decision." Under ORS 197.825(1), LUBA has jurisdiction over "any land use decision * * * of a local government."[3] A "land use decision" includes a final decision of a local government that concerns the application of its comprehensive plan or land use regulations.[4] ORS 197.175(1) requires counties to exercise their

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[3] ORS 197.825(1) provides in relevant part:

> "* * * [T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

[4] ORS 197.015(10)(a) defines "land use decision" to include:

> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation; * * *"

planning and zoning responsibilities, which includes the annexation of any unincorporated land into a special district in accordance with state and local land use laws.[5]

Intervenor concedes that annexations are generally land use decisions subject to LUBA review. However, intervenor argues in this case, the county followed a bifurcated process to approve the annexation. *See Johnson v. City of LaGrande*, 37 Or LUBA 380, 385 (1999) *aff'd* 167 Or App 35, 1 P3d 1036 (2000) (annexation statutes do not foreclose the possibility of a bifurcated process to consider the land use aspects of an annexation separately from the political process). According to intervenor, the challenged decision addresses only the annexation process set out in ORS 198.800-.805 and does not apply any land use regulations. Intervenor contends that the relevant land use decision was adopted separately when the county adopted the rural community plan policies and assigned rural community plan zoning designations to property located within the plan area in December 2002. Intervenor argues that petitioners may not now appeal those land use decisions in this appeal of the March 2003 annexation decision.

While we agree that it is theoretically possible to separate the land use requirements of an annexation from the election requirements set out in ORS 198.800-.805, it does not appear that that is what the county did here. Intervenor does not point to any part of the December 2002 decision that considers the question of annexation or applies land use criteria to conclude that the annexation complies with state and local land use criteria. In fact, it is the challenged decision that concludes the annexation "is consistent with the comprehensive plan." Record 69. That determination presumably requires the county to apply comprehensive plan policies, and thus makes this decision a land use decision. *Johnson* at 385 (where a city annexation decision includes a

[5] ORS 197.175(1) provides in pertinent part:

> "* * * counties shall exercise their planning and zoning responsibilities, including, but not limited to, a * * * special district boundary change which shall mean the * * * annexation to any special district authorized by ORS 198.705 to 198.955, 199.410 to 199.534 or 451.010 to 451.620, in accordance with ORS chapters 195, 196 and 197. * * *"

section that states that the proposed annexation is consistent with the city's plan, the annexation is a land use decision subject to LUBA review.)[6]

B. Mootness

ORS 197.805 establishes a statutory policy that LUBA's decisions "be made consistently with sound principles governing judicial review." Pursuant to this policy, an appeal will be dismissed as moot if a decision on the merits would be without practical effect. *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993). Intervenor argues that the May 2003 amendments to the March 2003 decision replaced the March 2003 decision (the decision challenged in this appeal) and therefore any decision by LUBA regarding the March 2003 decision would have no practical effect.

The May 2003 order did not replace the March 2003 decision to annex territory into the sewer district in its entirety. Rather, the May 2003 order corrected the legal description of Territory 4. A decision that simply corrects clerical mistakes in an earlier local government decision is not itself a separate appealable land use decision. *Kalmiopsis Audubon Society v. Curry County*, 27 Or LUBA 640, *aff'd* 131 Or App 308, 884 P2d 894 (1994), *rev den* 320 Or 567, 889 P2d 1299 (1995). The appealable land use decision was the March 2003 decision rather than the correcting May 2003 order. Therefore, the challenged appeal is not moot.

C. Timeliness of Appeal

Finally, intervenor argues that even if the challenged decision is a land use decision, and is not moot, petitioners failed to file a timely appeal. Intervenor argues that the challenged decision was adopted by the BCC on March 13, 2003, and petitioners' notice of intent to appeal was filed with LUBA on August 27, 2003. Intervenor argues that the deadline for filing petitioners' notice of intent to appeal is set out in ORS 197.830(9), and provides that a notice of intent to appeal must be filed within 21 days of the date that the decision became final. Intervenor contends that because

[6] However, we agree with intervenor that petitioners may not challenge the adoption of the rural community plan and zoning designations in this appeal of the annexation decision.

petitioners' notice of intent to appeal was filed more than 21 days after the county's decision became final, petitioners' appeal must be dismissed.

Petitioners respond that the timeliness of their notice of intent to appeal is governed by ORS 197.830(3), not ORS 197.830(9). Petitioners argue their appeal is timely under ORS 197.830(3) because (1) the county did not hold a hearing on the annexation decision and (2) even if the county did hold a hearing, the county's notice of hearing did not reasonably describe the proposed annexation decision. Petitioners also argue that the challenged decision is a quasi-judicial decision, and because the challenged decision is quasi-judicial, the county's failure to follow the quasi-judicial procedures set out at ORS 197.763 permits them to appeal under ORS 197.830(3) because the county did not provide a hearing as to them. *Leonard v. Union County,* 24 Or LUBA 362 (1992), *overruled on other grounds Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995).

ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing * * * 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 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:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

As noted above, petitioners contend the challenged annexation decision is a quasi-judicial decision and the county argues it is a legislative decision. Whether the challenged annexation is legislative or quasi-judicial has a bearing on the kind of hearing and the kind of notice of hearing the county was required to provide. We therefore first consider whether the challenged annexation was quasi-judicial or legislative, before considering whether the county "made a decision without

providing a hearing," and whether the county's notice "did not reasonably describe the local government's final action," within the meaning of ORS 197.830(3).

1. Quasi-Judicial v. Legislative Hearing

Petitioners argue that the challenged decision is a quasi-judicial decision and, therefore, even if the county held a hearing that would satisfy the standards for a legislative annexation hearing, that hearing did not comply with the ORS 197.763 requirements for a quasi-judicial land use hearing. Moreover, petitioners contend that because the challenged decision is quasi-judicial, they are entitled to written notice of the hearing, and they were not provided that notice. ORS 197.763(2)(a). As a result, petitioners argue, they are entitled to appeal pursuant to ORS 197.830(3), because the county failed to hold a hearing *as to them*.[7] *Leonard v. Union County*, 24 Or LUBA at 375.

To fully understand petitioners' arguments, some discussion of our decision in *Leonard* is in order. In *Leonard*, the petitioners appealed a county legislative comprehensive plan and land use regulation amendment more than 21 days after the decision became final. In response to a motion to dismiss for failing to file a timely appeal, petitioners argued that, notwithstanding the legislative nature of the decision, local code provisions required that the county provide mailed written notice to property owners within 300 feet of the properties that were the subject of the amendments. 24 Or LUBA at 369. The county did not provide the required written notice. Therefore, the petitioners contended that they were entitled to file a notice of intent to appeal within 21 days of when they knew or should have known of the decision. In that case, we assumed the petitioners were correct that the county's zoning code required individual notice of the legislative decision in that case. We held that where such notice is required, petitioners who are entitled to notice but do not receive it are entitled to file an appeal under ORS 197.830(3), because notice was not provided to them so

[7] Petitioners move for LUBA to consider evidence not in the record to support their contentions that the decision is quasi-judicial. We need not decide the motion, because even considering the proffered evidence we find the challenged decision to be legislative.

they could participate in the local proceedings and therefore have the opportunity to appeal under ORS 197.830(9). 24 Or LUBA at 374-375. In other words, with regard to those parties, the county rendered a decision without a hearing. 24 Or LUBA at 374-375.

Petitioners here do not argue that they are entitled to notice of a legislative decision regarding annexations to the district under the county code, district regulations or state law. Rather, petitioners characterize the challenged decision as a quasi-judicial decision, subject to the notice provisions of ORS 197.763(2).[8] Therefore, the threshold inquiry is whether the challenged decision is legislative or quasi-judicial. If it is the latter, then petitioners may be able to take advantage of the extended time for filing appeals provided by ORS 197.830(3).

In *Strawberry Hill 4-Wheelers v. Board of Comm'rs, Benton County*, 287 Or 591, 602-603, 601 P2d 769 (1979), the Court held that determining whether a matter is quasi-judicial or legislative requires the Court to consider three questions:

(1) Is the process bound to result in a decision?

(2) Is the decision bound to apply pre-existing criteria to concrete facts?

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[8] ORS 197.763 provides, in relevant part:

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, * * * on application for a land use decision * * *.
>
> "* * * * *
>
> "(2)(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:
>
> "(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;
>
> "(B) Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or
>
> "(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone."

(3) Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?

No one question is determinative, and answers to each of the questions must be considered. *Estate of Paul Gold v. City of Portland*, 87 Or App 45, 740 P2d 812, *rev den* 304 Or 405 (1987). The more definitely the questions are answered in the negative, the more likely the decision is to be legislative. Not surprisingly, the parties disagree as to the answers to these questions and the ultimate question of whether the challenged decision was quasi-judicial or legislative.

There is no statute or ordinance that required the county to take any action on the annexation petition. The annexation petition is an expressly permissive process. While the county "may" take action by approving the petition, there was no requirement that it do so. *Johnson v. City of La Grande*, 37 Or LUBA at 388; *Valerio v. Union County*, 33 Or LUBA 604 (1997). Therefore, the answer to the first question is in the negative.

Earlier in this opinion we disagreed with intervenor that the only land use decision made in the matter occurred in the comprehensive plan change creating the rural community boundary. The county applied pre-existing criteria to the annexation petition to conclude the proposed annexation is consistent with the comprehensive plan. This answers the second question in the affirmative. As we recognized in *Valerio*, however, applying pre-existing criteria to concrete facts is required "to some extent in nearly all land use decisions." 33 Or LUBA at 607.

Turning to the final question, whether the decision is directed at a closely circumscribed factual situation or a relatively small number of persons, we note the challenged decision affects over 60 different property owners and 125 acres. Record 113. Although we are not directed to any Oregon cases involving precisely similar numbers in this context, in general, annexations found to be quasi-judicial in nature have been focused on very circumscribed proposals. *Neuberger v. City of Portland*, 288 Or 155, 603 P2d 771 (1979) (three landowners); *Petersen v. City of Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977) (four landowners); *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997) (single development proposal). In contrast, at least one proposal that involved only nine parcels was found to be legislative. *Davenport v. City of Tigard*, 22 Or

LUBA 577 (1992). We believe a decision to annex 125 acres, including over 60 property owners, that expands a sewer district by 25 percent falls into the category of legislative decisions. Accordingly, we hold that the challenged decision was legislative and the county did not err in failing to provide individual written notice of the annexation hearing to property owners within 250 feet of the affected property.

2. Adequacy of Hearing

The fact that a hearing was conducted pursuant to annexation statute provisions does not mean that such a hearing cannot also constitute a "hearing" for purposes of ORS 197.830(3). ORS 197.830(3) does not say "without providing a quasi-judicial land use hearing"; it says "without providing a hearing." Annexation hearings may be hearings for purposes of land use statutes. *Morsman v. City of Madras*, __ Or LUBA __ (LUBA No. 2003-040, July 7, 2003) slip op 4, *reversed on other grounds*, 191 Or App 149, __ P3d __ (2004) (public hearing held pursuant to annexation statutes may suffice as a hearing under ORS 197.763).[9] The public hearing provided by the county with respect to the annexation in this case is sufficient to also constitute a legislative land use hearing for purposes of ORS 197.830(3). Petitioners may not avail themselves of ORS 197.830(3) to extend the time for filing the notice of intent to appeal under this theory.

3. Adequacy of Notice

Petitioners also argue that even if a hearing pursuant to ORS 198.800-.805 is adequate to constitute a hearing for the purposes of ORS 197.830(3), the notice for the proposed hearing that was published pursuant to ORS 198.800 did not adequately describe the county's action. The notice published and posted by the county states:

> "The Clatsop County Board of Commissioners will hold a public hearing on Wednesday, March 12, 2003 at 7:00 p.m. in the Clatsop County Courthouse at 749 Commercial Street, Astoria, OR 97103 on the Petition for Annexation of the following described real property into the Miles Crossing Sanitary Sewer District:

[9] There is no dispute that the county held a public hearing and that one of the petitioners appeared and testified at that hearing. Record 67.

"* * * * *

"**ANNEXATION TERRITORY 4**

"Legal Description:

"[Describing real property included in Territory 4.]" Record 1.

Petitioners argue that the above-quoted notice does not reasonably describe the final action taken by the county because the actual territory annexed into the district was later modified. As intervenor points out, however, the only change was the deletion of one parcel from Territory 4 and that property was not owned by any of the petitioners. The notice adequately described the final action taken by the county, and petitioners may not avail themselves of ORS 197.830(3) under this theory.

D. Conclusion

In summary, the county held a legislative hearing on the proposed annexation, and the notice of hearing adequately described the county's final decision. Further, petitioners were not entitled to individual written notice of the annexation hearing. Therefore ORS 197.830(3) does not apply. As a result, the general deadline for filing a notice of intent to appeal set out at ORS 197.830(9) applies and petitioners were required to file their notice of intent to appeal within 21 days of the date the challenged decision became final on March 13, 2003. They did not do so. Therefore, this appeal must be dismissed.

Petitioners move for LUBA to consider evidence outside the record pursuant to OAR 661-010-0045(1) to demonstrate that they are adversely affected by the challenged decision as is required by ORS 197.830(3). However, as we conclude above, the applicable appeal deadline is governed by ORS 197.830(9). Petitioners' proffered evidence is relevant only under ORS 197.830(3) and, therefore, we deny petitioners' motion.

In the event we conclude that we do not have jurisdiction to review the challenged decision, petitioners request that we transfer this decision to circuit court pursuant to ORS 34.102(4). We have concluded that the challenged decision is a land use decision subject to our jurisdiction, but

that petitioners failed to file a timely appeal. Dismissal of the appeal is appropriate, rather than a transfer to circuit court. *Hammer v. Clackamas County*, __ Or LUBA __ (LUBA No. 2002-165) slip op 7, *aff'd* 190 Or App 473, __ P3d __ (November 15, 2003).

Accordingly, this appeal is dismissed.