BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TOM CUTSFORTH, ED ARGETSINGER,
BECKY ARGETSINGER, JAMES CHERRY,
MAX DILLEY, TERESA DILLEY, JEFF DuMONT,
DOUG HUFF, ALLEN NELSON, JODI NELSON,
JAIMY PATTON, JACK BEAKEY, TONI BEAKY,
JACK DOTY, LARRY ENGOM, DARLA ENGOM,
JAMES KIEF, JAYNE KIEF, STEPHEN R. NEWMAN,
AL PRICE, ROCKY SITTON, YVONNE SITTON,
BILL BUSKIRK, MIKE DECKER, WENDY DECKER,
WES DuMONT, BEV DuMONT, FRED FICQ,
JERRY McINTOSH, SUE McINTOSH,
PAUL PARMENTER, ALLISON PARMENTER,
TOM SANDERSON, HOPE SANDERSON,
DORIS SCHARPF and KIRK TIBBETS,
Petitioners,

vs.

CITY OF ALBANY,
Respondent.

LUBA No. 2004-141

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Edward F. Schultz, Albany, filed the petition for review and argued on behalf of petitioners. With him on the brief was Weatherford, Thompson, Cowgill, Black and Schultz, PC.

James V. B. Delapoer, Albany, filed the response brief and argued on behalf of respondent. With him on the brief was Long, Delapoer, Healy, McCann and Noonan, PC.

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

DISMISSED 12/01/2004

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

Petitioners appeal a city council resolution referring an annexation proposal to city voters.

REPLY BRIEF

Petitioners move to file a reply brief to address new matters raised in the response brief. There is no opposition to the motion, and it is allowed.

FACTS

The subject area consists of 97 parcels totaling approximately 310 acres, located within the city urban growth boundary. The subject area is located on a bend of the Calapooia River, and is bordered by the river on the north, west and south, and the existing city limits on the east. On April 28, 2004, the city council authorized city staff to begin proceedings to annex the subject area pursuant to ORS 222.750, which allows annexation of lands surrounded by a city or by a city and a "stream," without consent of the owners of property within the annexed territory.[1]

Ordinance 5366 sets forth the procedures and criteria for annexation. Under Section 2 of that ordinance, the city council conducts a public hearing on the proposed annexation, and determines whether to approve it based on "Eligibility" and "Timeliness" criteria.[2] Pursuant

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[1] ORS 222.750 provides:

> "When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory."

[2] Section 2 of Ordinance 5366 provides, in relevant part:

> "A. Eligibility Criteria. The City Council shall determine that property is eligible for annexation based on the following criteria:

to section 3 of that ordinance, if the city council approves the annexation, it adopts a resolution that places the proposed annexation before the city voters, a vote required by city charter.[3] If the city voters approve the annexation, pursuant to section 5 of Ordinance 5366

"1. The property is contiguous to the existing city limits.

"2. The property is located within the Albany Urban Growth Boundary as established by the Albany Comprehensive Plan.

"B. Timeliness Criteria: The City shall determine that it is timely to annex property based on the following criteria:

"1. An adequate level of urban services and infrastructure is available, or will be made available in a timely manner.

"a. 'Adequate level' means conforms to adopted plans and ordinances.

"b. 'Urban Services' means police, fire, and other City-provided services.

"c. 'Infrastructure' means sanitary sewer, water, storm drainage, and streets.

"d. 'Be made available in a timely manner' means that improvements needed for an adequate level of urban services and infrastructure will be provided in a logical, economical, and efficient manner. Improvements for needed infrastructure may be secured by a development agreement or other funding mechanism that will place the primary economic burden on the territory proposed for annexation and not on the City of Albany generally.

"2. Sufficient planning and engineering data have been provided, and all necessary studies and reviews have been completed such that there are no unresolved issues regarding appropriate Comprehensive Plan and implementing ordinances. * * *

"3. The City shall attempt to discourage islands or enclaves of unincorporated territory surrounded on all sides by the City.

"4. The City Council may consider, at its discretion, any other factor which affects the timeliness or wisdom of any particular annexation petition."

[3] Section 3 of Ordinance 5366 provides:

"A. Public Hearing Required. The City Council shall conduct a public hearing on an annexation petition. Individual notice shall not be required. Instead, one notice shall be published in the Albany Democrat-Herald at least two weeks prior to the hearing. The property will be posted at least thirty days prior to the hearing.

the city council shall by ordinance "set the final boundaries of the area to be annexed" and "proclaim the annexation in accordance with state law."

The city scheduled a public hearing on the proposed annexation for July 28, 2004, and although not required to by Ordinance 5366, mailed or attempted to mail individual notice of the hearing to all of the property owners within the subject area, including the petitioners in this appeal.[4] The notices were individually addressed to each landowner within the affected area, but were otherwise identical. City staff inadvertently placed some of the individually

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> "B. City Council Decision. Following the close of the hearing, the City Council may determine whether it is timely to annex eligible property.
>
> "1. The decision to approve the annexation and set an election shall be at the discretion of the City Council and shall be approved/authorized by resolution. If approved/authorized, the matter shall be placed before the voters of the City in the manner prescribed by resolution of the City Council.
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> "2. The City Council may deny an annexation petition based on its legislative determination that the annexation is not timely or is unwise. An annexation petition denied by the City Council will not be set for an election."

[4] The notice of hearing states, in relevant part:

> "While the Council is not required to hold a public hearing on island annexations, they will hold one on July 28, 2004, at City Hall at 7:15 p.m. In deciding whether to put annexations on the ballot, the Council typically looks at whether an annexation is timely. The principal timeliness criterion is whether or not 'an adequate level of urban services is available or can be made available in a timely manner.' In the case of island annexations, state law [ORS 222.750] presumes that the city may already be providing certain municipal services to these properties.
>
> "A primary reason the Council is pursuing island annexations is to create logical city limit lines for fire, ambulance and law enforcement response.
>
> "We have attached a staff report on this proposed annexation, including maps showing the existing Comprehensive Plan designations and proposed zoning. More than two-thirds of the property would be zoned Open Space. Most of this land is near the Calapooia River and would be left in its natural state. All of the other zoning would be low density residential (RS-6.5), in keeping with existing development patterns and surrounding zoning.
>
> "If you have comments regarding the potential annexation of your property, you are welcome to attend the public hearing on July 28 or to send written comments to [the city] * * *." Record 23.

addressed notices into envelopes that were addressed to other landowners, so that some landowners received notices addressed to others.

Many of the petitioners in this appeal subsequently appeared and testified at the July 28, 2004 hearing. At the conclusion of public testimony, the city council closed the record and voted 5-0 to adopt a resolution, Resolution 5007, that refers the proposed annexation to the city voters. The mayor signed Resolution 5007 on July 28, 2004, the same date as the hearing. The city did not mail individual notices of the decision to any participants at the hearing, including those petitioners who appeared at the hearing.

Thirty-five days later, on September 1, 2004, petitioners filed with LUBA a notice of intent to appeal Resolution 5007. In an apparent response to that appeal, the city council adopted Resolution 5045 on September 20, 2004. Resolution 5045 establishes a procedure under which, if the proposed annexation receives voter approval, the city council will not proclaim the annexation until it conducts a land use hearing and determines that the annexation is consistent with all applicable land use criteria.[5] On November 2, 2004, city voters approved the proposed annexation.

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[5] Resolution 5045 states, in relevant part:

> "WHEREAS, on September 1, 2004, the City received a Notice of Intent to Appeal [Resolution 5007] to [LUBA]; and
>
> "WHEREAS, the City Council believes it is self-evident that annexation of statutorily defined islands will always comply with a city's land use regulations; and
>
> "WHEREAS, the City Council desires, by this resolution, to establish a procedure which will address petitioners' anticipated concerns by requiring a land use public hearing and the adoption of land use findings prior to any City action to proclaim the subject annexation, in the event of voter approval.
>
> "NOW, THEREFORE, BE IT RESOLVED BY THE ALBANY CITY COUNCIL that the following procedure will be applied to the 'West Albany island' annexation:
>
> "1. Prior to the City Council proclamation of annexation pursuant to ORS 222.150, the City will hold, following appropriate notice, a land use hearing.

MOTION TO DISMISS

The city moves to dismiss the appeal of Resolution 5007, on the grounds that (1) petitioners failed to file a timely appeal of Resolution 5007, and (2) Resolution 5007 is not a land use decision within LUBA's jurisdiction. Because we agree with the city that none of the petitioners filed a timely appeal of Resolution 5007, we do not address the city's other jurisdictional argument.

As relevant here, ORS 197.830(9) requires the notice of intent to appeal be filed no later than 21 days after the date the challenged decision becomes final.[6] ORS 197.830(3) provides an alternative filing deadline in certain limited circumstances.[7] Under

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> "2. The annexation will only be proclaimed after the City Council has determined that all applicable land use criteria have been met, following adoption of appropriate land use findings and mailing of the notice of decision.
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> "3. In the event that the annexation is approved by the voters and the City Council subsequently determines that the application does not meet applicable land use criteria, the City Council will either not proclaim the annexation or take such other steps as may be necessary to nullify the election or initiate withdrawal of the territory in accordance with ORS 222.460.
>
> "4. If [LUBA] or a court of competent jurisdiction determines that a land use determination of eligibility for annexation is required as precondition to this annexation, the City Council interprets such a determination as a requirement of 'state law' as that term is used in Ordinance No. 5366, Section 5, and will, therefore, not proclaim the annexation of the 'West Albany island' without satisfying the appropriate land use requirements." Record 2-3.

[6] 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. * * *"

[7] 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) 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 the board under this section:

ORS 197.830(3), where a local government "makes a land use decision without providing a hearing," a person adversely affected by that decision may appeal the decision to LUBA within 21 days of "actual notice," where notice is required, or within 21 days of the date the petitioner "knew or should have known of the decision," where no notice is required.

In the present case, petitioners argue that ORS 197.830(3) provides the relevant filing deadline rather than ORS 197.830(9). According to petitioners, the city committed one or more procedural errors with respect to each petitioner, and those procedural errors allow the petitioners to appeal the challenged resolution to LUBA more than 21 days from the date that decision became final, under either ORS 197.830(3)(a) or (b).

In order to address the parties' arguments under ORS 197.830(3), we follow the parties in distinguishing between (1) a petitioner who allegedly did not receive the notice of hearing and did not appear at the hearing, and (2) petitioners who appeared and testified at the July 28, 2004 hearing.[8]

A. Petitioners Who Did Not Receive Notice of the Hearing

Petitioners assert, based on an affidavit, that petitioner Tom Cutsforth did not receive written notice of the July 28, 2004 hearing regarding the annexation of his property.[9]

"(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."

[8] There appears to be a third category of petitioners that the parties do not discuss: petitioners who were mailed and presumably received notice of the hearing, but did not appear at the July 28, 2004 hearing. This category includes the following petitioners: James Cherry, Doug Huff, Allen Nelson, Jodi Nelson, Jack Beakey, Toni Beakey, Stephen R. Newman, Jerry McIntosh, Sue McIntosh, and Doris Scharpf. There also appears to be a fourth category: individual petitioners who presumably received notice and did not testify in person or in writing at the hearing, but whose spouses or perhaps housemates testified. As far as we can tell, this category includes James Kief, Hope Sanderson, Ed Argetsinger, Allison Parmenter, Yvonne Sitton, Darla Engom, Teresa Dilley, Wes DuMont, and Jeff DuMont. It may be that spouses or other persons testified on behalf of the above-named persons, but the record is less than clear on that point, and the parties provide no assistance. Given our disposition of the jurisdictional question below, we need not discuss either the third or fourth category of petitioners separately. Under our analysis, it is clear that neither of these categories of petitioners can appeal Resolution 5007 under ORS 197.830(3)(a) or (b), and their appeal is untimely under ORS 197.830(9).

[9] The affidavit states, in relevant part:

According to petitioners, the proposed annexation is a quasi-judicial decision, and therefore the July 28, 2004 hearing on the annexation was subject to the procedures governing quasi-judicial hearings at ORS 197.763. Petitioners contend that Cutsforth, as well as the other petitioners, was entitled to individual written notice under ORS 197.763(2). Petitioners argue that the city failed to provide that notice to Cutsforth.

Petitioners concede that the record includes a list of persons and addresses that the city staff apparently used to generate and mail individual written notice of the July 28, 2004 hearing, and that that list includes petitioner Cutsforth. Record 27. Petitioners do not dispute that the address shown on Record 27 for petitioner Cutsforth is accurate. However, we understand petitioners to argue that it cannot be presumed under the present circumstances that the city in fact mailed notice of the hearing to Cutsforth. Petitioners emphasize that (1) the city has acknowledged that its mailing was defective, in that at least some individually-addressed notices were placed in the wrong envelopes; and (2) the city does not dispute Cutsforth's affidavit, in which Cutsforth avers that he did not receive any notice, although he regularly receives the city's water billings. Further, petitioners argue, because the hearing on Resolution 5007 was a quasi-judicial land use hearing subject to the requirements of ORS 197.763, the city cannot rely on the mailing list to claim that notice of the hearing was provided, because the city has failed to "demonstrate by affidavit that such notice was given," as required by ORS 197.763(8).[10]

> "2. At no time prior to the public hearing held on July 28, 2004 regarding the proposed annexation of my property by the City of Albany did I receive a notice of said hearing. I have also never received notice of the decision made at that hearing.
>
> "3. I am a user of City water and am billed regularly for that service. There has never been a problem in receiving the water bill from the City." Affidavit of Tom Cutsforth, Petition for Review Appendix 4.

[10] ORS 197.763(8) provides:

> "The failure of the property owner to receive notice as provided in this section shall not invalidate such proceedings if the local government can demonstrate by affidavit that such

In sum, petitioners argue that because the city failed to mail Cutsforth the individual written notice of the hearing to which he was entitled, the city failed to provide a hearing as to Cutsforth, and therefore Cutsforth's deadline for filing the notice of intent to appeal is governed by ORS 197.830(3) rather than ORS 197.830(9). According to petitioners, Cutsforth filed the notice of intent to appeal within 21 days of being informed of the city's decision, and therefore Cutsforth's appeal is timely pursuant to ORS 197.830(3)(b).

The city responds that under the test described in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), an annexation of an area consisting of 97 parcels totaling 310 acres is a legislative, not quasi-judicial decision. Because Resolution 5007 is a legislative decision and not a quasi-judicial decision, the city argues, ORS 197.763 and corresponding city code provisions do not apply. Further, the city argues that ORS 197.830(3)(b) does not apply to petitioner Cutsforth because the city in fact provided a hearing, and in any case the city in fact mailed Cutsforth individual notice of that hearing. The city does not dispute that Cutsforth did not receive the notice, but argues that that failure to receive the notice is immaterial for purposes of ORS 197.830(3), because the mailing list in the record is sufficient to establish that the city in fact mailed a notice to Cutsforth.

> notice was given. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television."

Albany Development Code (ADC) 1.420(1) has a similar provision under the code sections that govern quasi-judicial proceedings:

> "Notice by mail shall be deemed given on the day the notice is deposited with the US Postal Service, first class postage, fully prepaid, for mailing to the addressee at the addressee's last known mailing address. Failure of the addressee to actually receive notice shall not invalidate the proceeding if the City can demonstrate by affidavit that notice was given. * * *"

In addition, ADC 1.400(1) provides:

> "* * * Any deficiency in the form of notice prescribed in this section or a failure of a property owner to receive notice shall not invalidate an action if a good faith attempt was made to comply with the requirements of this Code for notice."

Where ORS 197.830(3) applies, it generally applies to land use decisions made without a hearing. However, by its terms and as a matter of interpretation by this Board, it potentially applies to two narrow circumstances where a local government in fact provides a hearing. First, ORS 197.830(3) can apply where "the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions[.]" *Bigley v. City of Portland*, 168 Or App 508, 4 P3d 741 (2000). Second, ORS 197.830(3) can apply where the local government fails to provide notice of hearing to a person entitled to that notice under state or local law, and due to that failure the person does not appear at the hearing and thereby become entitled to notice of the decision. *Leonard v. Union County*, 24 Or LUBA 362, 374-76 (1992), *overruled in part Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995).[11]

In *Leonard*, the county adopted a legislative land use decision after a hearing, but without providing Leonard with notice of the hearing to which he was entitled under the local code. We held that Leonard could potentially appeal the decision to LUBA under ORS 197.830(3)(b), because the county had failed to "provid[e] a hearing" with respect to Leonard. That reasoning was based on *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989) and similar cases holding that lack of appearance and other jurisdictional defects are not an impediment to judicial review, where those defects were caused by the local governments' failure to comply with statutorily required notice and hearing requirements. The court in *Flowers* held that the statutory appearance requirement is obviated, where the local government's failure to provide notice and a hearing substantially defeats the ability to

[11] In *Orenco Neighborhood*, the Court of Appeals held that the deadlines for appealing a post-acknowledgment plan amendment are controlled exclusively by the second sentence of ORS 197.830(9). *See* n 6. According to the court, ORS 197.830(3) does not apply under the reasoning in *Leonard* where the petitioner is only entitled to notice of the hearing on a post-acknowledgment plan amendment under local law. 135 Or App at 432. The court declined to address whether *Leonard* was correctly decided, as applied to other circumstances.

appear and achieve standing to challenge the failure to provide them. In *Leonard*, LUBA extended that reasoning to ORS 197.830(3) and to circumstances where notice is required by local code rather than by statute.

In the present case, we agree with the city that the filing deadline for petitioner Cutsforth is not governed by ORS 197.830(3), under the rationale described in *Leonard* or any other rationale. Petitioners' entire argument under ORS 197.830(3) is premised on the view that the July 28, 2004 hearing on adoption of Resolution 5007 was a quasi-judicial hearing governed by ORS 197.763(2), which would entitle Cutsforth to individual written notice of the hearing. However, for the following reasons, we agree with the city that Resolution 5007 is properly viewed as a legislative decision under *Strawberry Hill 4 Wheelers* rather than a quasi-judicial decision.

In *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997), we summarized the *Strawberry Hill 4 Wheelers* factors as follows:

1. Is the process bound to result in a decision?
2. Is the decision bound to apply preexisting criteria to concrete facts?
3. Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?

The more definitely these questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. *Id.* The answer to each question must be weighted, but no single answer is determinative. *Estate of Gold v. City of Portland*, 87 Or App 45, 740 P2d 812 (1987).

With respect to the first question or factor, while the city is obligated under Ordinance 5366 to act on a petition for annexation, in the present case it appears that city staff initiated the annexation proposal without a petition, apparently at the request of the city council. As far as we can tell, under Ordinance 5366 nothing obligates the city council to reach a decision with respect to an annexation proposal initiated by the city.

The second factor is present in nearly all land use decisions to some degree, even legislative decisions. Judging at least from the criteria in Ordinance 5366, it appears that in order to approve the annexation the city council must apply preexisting criteria to relatively concrete facts. *See* n 2.

Like the first question, the third *Strawberry Hill* question is answered in the negative. A proposal affecting an area of 310 acres consisting of 97 separate parcels is not, in our view, "directed at a closely circumscribed factual situation or a relatively small number of persons." *See Miner v. Clatsop County*, 46 Or LUBA 467, 476-77 (2004) (annexation involving 125 acres and 60 different property owners is legislative); *Johnson v. City of La Grande*, 37 Or LUBA 380, 388 (1999), *aff'd* 167 Or App 35, P3d 1036 (2000) (annexation of 155 parcels under 127 different ownerships is legislative). Because two of the three *Strawberry Hill* factors point to the conclusion that the challenged decision is legislative in character, and the remaining factor is not conclusive, on balance we agree with the city that Resolution 5007 is a legislative decision.

It follows that, while the proceedings leading up to adoption of Resolution 5007 may be governed by the procedures at Ordinance 5366, and perhaps also by the procedures for legislative decisions at Albany Development Code (ADC) 1.580 to 1.660, they are not governed by the requirements for quasi-judicial hearings at ORS 197.763 or the equivalent local requirements at ADC 1.380 to 1.570. Therefore, petitioner Cutsforth was not entitled to individual written notice under ORS 197.763(2) and the city is not required by ORS 197.763(8) to demonstrate, by affidavit, that it actually mailed notice to Cutsforth.

Although petitioners cite only ORS 197.763 as a source of Cutsforth's entitlement to individual written notice of the July 28, 2004 hearing, we have also considered whether any local code provisions might entitle petitioners to such notice. As far as we can tell, the answer is no. Ordinance 5366 specifies that no individual written notice of a hearing on a

proposed annexation is required. *See* n 3. Nothing in the procedures for legislative decisions at ADC 1.580 to 1.660 requires individual written notice of legislative hearings.

Consequently, ORS 197.830(3) does not provide the applicable deadline for appealing Resolution 5007 to LUBA. The city "provid[ed] a hearing" with respect to Cutsforth, and neither of the two potential bases to appeal under ORS 197.830(3) notwithstanding that the city provided a hearing are available. Therefore, as to Cutsforth, ORS 197.830(9) provides the applicable deadline for appealing Resolution 5007. Petitioners do not argue that the notice of intent to appeal was timely filed under ORS 197.830(9), and we do not see that it was.

B. Petitioners Who Appeared at the July 28, 2004 Hearing

With respect to those petitioners who appeared and testified at the July 28, 2004 hearing, petitioners argue that their appearance entitled those petitioners to individual written notice of the decision, and the city's failure to provide any notice of decision at all allows those petitioners to file an appeal under the deadline at ORS 197.830(3)(a), *i.e.*, within 21 days of the date of "actual notice."[12]

We do not understand the city to dispute that those petitioners who participated in the July 28, 2004 hearing may have been entitled to notice of the decision.[13] However, the city responds, and we agree, that the city "provid[ed] a hearing" to those petitioners who appeared

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[12] Petitioners do not specifically identify those petitioners that appeared and testified at the hearing. As far as we can tell from the minutes, sign-up sheet and written testimony in the record, the only petitioners who actually testified at the July 28, 2004 hearing or provided written testimony are Fred Ficq, Jayne Kief, Tom Sanderson, Becky Argetsinger, Paul Parmenter, Rocky Sitton, Al Price, Larry Engom, Bill Buskirk, Max Dilley, Kirk Tibbets, Beverly DuMont, Jack Doty, Mike Decker, Wendy Decker, and Jaime Patton. James Kief signed up to speak in opposition, although the minutes do not reflect his testimony. As noted above, it is not clear from the record whether any petitioners testified on behalf of spouses or other persons, for example, whether Jayne Kief testified on behalf of petitioner James Kief, or whether Beverly DuMont spoke on behalf of petitioners Wes DuMont or Jeff DuMont.

[13] We note that ADC 1.650(2), part of the code provisions governing legislative land use proceedings, requires that the city provide written notice to "any person who participated in the proceedings leading to the decision." The notice must briefly describe the action taken, state the date and the effective date of the decision, and explain the requirements for appealing the action to LUBA. *Id.*

at the July 28, 2004 hearing, and therefore those petitioners cannot appeal Resolution 5007 under either ORS 197.830(3)(a) or (b). Because those petitioners cannot invoke the alternative deadlines in ORS 197.830(3), the deadlines for those petitioners to appeal Resolution 5007 to LUBA are set out in ORS 197.830(9).

Petitioners do not argue that their appeal is timely under ORS 197.830(9). As the city points out, in *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), the Court of Appeals held that ORS 197.830(9) requires that the notice of intent to appeal be filed within 21 days of the date the decision sought to be reviewed became final, not the date the notice of decision is mailed. *See* n 6. *Wicks-Snodgrass* overruled an earlier case, *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986), that announced a judicial tolling doctrine based on the date the notice of decision is mailed rather than the date the decision becomes final. *Wicks-Snodgrass* involved an appeal that was filed at LUBA 22 days after the appealed decision became final, but filed 21 days after the city mailed the petitioner notice of the decision, *i.e.*, circumstances where the petitioner had relatively ample notice and opportunity to file the appeal within the statutory 21-day deadline. The court in *Wicks-Snodgrass* did not address circumstances, such as the present case, where there is a *complete failure* to provide notice of the decision to persons who appeared at the hearing and who are arguably entitled to that notice under local code. It may be that *Wicks-Snodgrass* is distinguishable under the present circumstances, or that the principle described in *Flowers* might operate to allow review notwithstanding an untimely appeal, where the untimely appeal is attributable to the city's failure to provide any notice of the decision at all. However, we decline to speculate further on these points, for two reasons. One, petitioners do not discuss *Wicks-Snodgrass*, *Flowers* or ORS 197.830(9) at all. Second, we question whether the causative element inherent in *Flowers* is met in this case. As far as we can tell from the record, Resolution 5007 was signed by the mayor at the conclusion of the July 28, 2004 hearing on the annexation proposal. If there is some reason why the petitioners present

at that hearing did not or could not know that the city had adopted Resolution 5007, signed and effective on July 28, 2004, no party points it out to us. As to those petitioners who appeared at the July 28, 2004 hearing, petitioners do not explain why they waited 35 days to file their appeal, or allege that the delay was caused by the city's failure to provide individual written notice of the decision.

C. Conclusion

For the foregoing reasons, petitioners filed an untimely appeal of Resolution 5007, and therefore LUBA has no jurisdiction over the appeal.

This appeal is dismissed.