



1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals Washington County's adoption of  
4 Ordinance No. 482. The ordinance applies the county's  
5 Mineral and Aggregate Overlay Districts A and B to certain  
6 properties in rural Washington County.

7 **MOTION TO INTERVENE**

8 James Smejkal, the applicant below, moves to intervene  
9 on the side of respondent. There is no opposition to the  
10 motion and it is allowed.

11 **FACTS**

12 On August 7 and 9, 1996, the county planning division  
13 mailed notice to certain persons that the county planning  
14 commission and the county board of commissioners (county  
15 board) would hold public hearings on proposed Ordinance 482.  
16 The notice included a copy of the proposed ordinance, and  
17 summarized its effect as amending the county comprehensive  
18 plan and as applying the county's Mineral and Aggregate  
19 (M&A) Overlay Districts A and B to two properties located  
20 north of Buxton. Affidavit of Bonita Gorsche, Exhibit 2,  
21 page 2.<sup>1</sup> The notice was mailed to persons on two separate  
22 lists: The first list was the county's "General

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<sup>1</sup>M&A Overlay District A "allows extraction, processing and stockpiling of aggregate-quarry activities." Affidavit of Bonita Gorsche, Exhibit 1, page 4. M&A Overlay District B "imposes design and site location standards on noise-sensitive uses - usually dwellings." Id.

1 Notification List," and included persons who had requested  
2 and paid for notices of the county's land use ordinance  
3 updates. Affidavit of Bonita Gorsche, Exhibit 1, page 2.  
4 The second list was intended to include the owners of record  
5 of property within 500 feet of the property that was the  
6 subject of the notice. ORS 197.763(2)(a)(C).<sup>2</sup>

7 One of the two mineral and aggregate sites affected by  
8 Ordinance 482 is described in the county's notices and the  
9 ordinance as "a portion of Tax Lot 500, Tax Map 3N4C." It  
10 is known as "the Genzer site." The Genzer site is accessed  
11 from N.W. Bacona Road. Petitioner resides at 28055 N.W.  
12 Bacona Road; his property is within 500 feet of the Genzer  
13 site. Petitioner's property also appears to be included in  
14 the M&A Overlay District B, which was applied to properties  
15 within 1000 feet of the area designated as District A. The  
16 Genzer site and petitioner's property are located in a  
17 resource zone, which means that the county was required by  
18 ORS 197.763(2)(a)(C) to provide petitioner with notice of  
19 the hearings on Ordinance 482.

20 On August 9, 1996, the county sent a copy of the notice  
21 of the hearings to "Henry M. and Arleene Frecke at HCT Box  
22 300 Bacona Road, Buxton Oregon." Affidavit of Lynda Trost,

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<sup>2</sup>The county also published notice in the Hillsboro Argus and The Oregonian. Respondent's Motion to Dismiss 5 and Exhibits 2 and 3.

1 Exhibit 1.<sup>3</sup> The U.S. Postal Service marked the envelope "no  
2 such address," and returned it to the county on August 15,  
3 1996. Id. The county reviewed its records, changed the  
4 address to "28055 N.W. Bacona Road," and again sent the  
5 notice to the Freckes at the new address on August 16, 1996.  
6 Id. The Postal Service again returned the envelope to the  
7 county, this time marked "addressee unknown." Id. The  
8 county "promptly" sent the notice again, this time to  
9 "current resident" at "28055 N.W. Bacona Road." Id. The  
10 third mailing was not returned to the county.

11 Consistent with the notice, the planning commission  
12 held a public hearing on the proposed ordinance on August  
13 21, 1996.<sup>4</sup> Also consistent with the notice, the county  
14 board held a public hearing on the proposed ordinance on  
15 September 17, 1996. The county board held a second public  
16 hearing on October 8, 1996 and a third on October 22, 1996.  
17 The county board adopted the ordinance at the conclusion of  
18 its third public hearing on October 22, 1996. This appeal  
19 followed.

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<sup>3</sup>The Affidavit of Lynda Trost, which is attached to the county's motion to dismiss, identifies her as a planning assistant with Department of Land Use and Transportation for Washington County, and states that she has personal knowledge of the matters described in her affidavit.

<sup>4</sup>According to respondent, the planning commission held public hearings on the proposed ordinance on August 21, September 4 and October 2, 1996. Respondent's Motion to Dismiss 2.

1 **MOTION TO DISMISS**

2           Petitioner filed his notice of intent to appeal  
3 Ordinance 482 on March 21, 1997, approximately five months  
4 after the county's decision adopting the ordinance became  
5 final. On April 4, 1997, the county filed a motion to  
6 dismiss, alleging that petitioner's notice of intent to  
7 appeal was not timely and that petitioner lacks standing to  
8 bring this appeal.<sup>5</sup> Petitioner responds that his appeal was  
9 timely and that he has standing based on ORS 197.830(3).  
10 Petitioner asserts the county did not provide him with  
11 notice of the hearings and thus "failed to provide a  
12 hearing" as to him. Leonard v. Union County, 24 Or LUBA  
13 362, 374-75 (1992). Therefore, petitioner argues, the  
14 appearance requirement was waived as to him, and the 21-day  
15 appeal period was tolled as to him until he received actual  
16 notice of the challenged decision.

17           In short, petitioner contends the county failed to  
18 provide him with notice of the hearings on Ordinance 482 and  
19 he was, therefore, unaware of the proceedings and unable to  
20 appear. Citing Sparrows v. Clackamas County, 24 Or LUBA 318  
21 (1992) and other cases, petitioner reasons that since he had  
22 no notice of the proceedings, the appearance requirement

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<sup>5</sup>At the same time, respondent filed a motion for an extension of time to  
for filing the record until after the Board resolves the motion to dismiss.  
By order dated April 4, 1996, the Board granted the motion for extension of  
time for filing the record, and effectively suspended the proceedings until  
resolution of the motion to dismiss.

1 does not apply to him, and he is entitled to pursue this  
2 appeal based on ORS 197.830(3)(a).

3 ORS 197.830(3) provides:

4 "If a local government makes a land use decision  
5 without providing a hearing or the local  
6 government makes a land use decision which is  
7 different from the proposal described in the  
8 notice to such a degree that the notice of the  
9 proposed action did not reasonably describe the  
10 local government's final actions, a person  
11 adversely affected by the decision may appeal the  
12 decision to the board under this section:

13 "(a) Within 21 days of actual notice where notice  
14 is required; or

15 "(b) Within 21 days of the date a person knew or  
16 should have known of the decision where no notice  
17 is required."

18 In Leonard v. Union County, we construed the words "without  
19 providing a hearing," as used in ORS 197.830(3), to include  
20 circumstances where a local government is required by state  
21 or local law to hold a hearing but does not, and  
22 circumstances where a local government holds a hearing, but  
23 does not provide notice of the hearing to persons who are  
24 entitled to such notice under state or local law. Leonard  
25 at 374-75. Petitioner asserts that this case falls under  
26 the second set of circumstances. Petitioner maintains that  
27 he was entitled to notice of the hearings pursuant to ORS  
28 197.763(3) and that the county failed to provide such

1 notice.<sup>6</sup>

2       The county does not dispute that petitioner is an owner  
3 of record of property within 500 feet of the Genzer site or  
4 that it was therefore required by ORS 197.763(3) to provide  
5 petitioner with notice of the hearings on the ordinance.  
6 The county contends it met its statutory obligation by  
7 sending the notice to "current resident, 28055 N.W. Bacona  
8 Road, Buxton Oregon." The county argues that because none  
9 of the circumstances described in Leonard exist in this  
10 case, ORS 197.830(3) does not apply.

11       Petitioner claims he never received the notice of the  
12 hearings and supports the claim with affidavits.  
13 Petitioner's Response to Respondent's Motion to Dismiss,  
14 Exhibits 3 and 10. Petitioner contends the county failed in  
15 two ways to meet its obligation under ORS 197.763(3) to  
16 provide him with notice. First, petitioner states:

17       "[t]he County knew, from the returned envelopes,  
18 of a problem with delivery of the notice of  
19 hearing to the Petitioner \* \* \*. The County did  
20 nothing to determine if Petitioner received notice

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<sup>6</sup>Petitioner also claims he was entitled to notice of the hearings under Washington County Development Code 204-4.2. However, in Orengo Neighborhood Organization v. City of Hillsboro, 135 Or App 428, 899 P2d 720 (1995), the Court of Appeals overruled our holding in Leonard that local notice requirements can be applied under ORS 197.830(3) to toll the 21-day appeal period. Consequently, whether the county met its obligation to provide notice of the hearings pursuant to its own code has no bearing on whether petitioner's appeal was filed in a timely manner. We do not address the local code requirements further.

1 of decision<sup>[7]</sup> \* \* \*." Petitioner's Response to  
2 Respondent's Motion to Dismiss 4.

3 Petitioner does not refer us to any statutory, goal,  
4 rule or local code provision that requires the county to  
5 ensure the notices it sends are received by the addressees.  
6 ORS 197.763(8) makes clear that local governments have no  
7 such duty:

8 "The failure of the property owner to receive  
9 notice as provided in this section shall not  
10 invalidate such proceedings if the local  
11 government can demonstrate by affidavit that such  
12 notice was given."

13 Second, petitioner questions the source of the county's  
14 mailing lists. ORS 197.763(2) provides:

15 "[n]otice of the hearings governed by this section  
16 shall be provided to the applicant and to owners  
17 of record of property on the most recent property  
18 tax assessment roll where such property is located  
19 [within specified distances from the property that  
20 is the subject of the application]." (Emphasis  
21 added.)

22 Petitioner contends that the database the county uses to  
23 generate the mailing lists for notices required by ORS  
24 197.763 is not the county's most recent property tax  
25 assessment roll. See Walz v. Polk County, 31 Or LUBA 363,  
26 369 (1996). Petitioner further contends that in a March 14,

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<sup>7</sup>We assume that petitioner intended to refer to notice of the hearing, and not notice of the decision. At one point, petitioner does complain that "[t]he county failed to provide either a notice of hearing or notice of decision to the petitioner." Petitioner's Response to Respondent's Motion to Dismiss 4, lines 18-19. However, petitioner does not otherwise claim or suggest he was entitled to notice of the decision.

1 1997 letter to petitioner the county "admits that it did not  
2 use the 'tax [rolls]' \* \* \* or 'tax assessment roll' \* \* \*  
3 when preparing hearing notices." Petitioner's Response to  
4 Respondent's Motion to Dismiss 7, and Exhibit 6.

5 Even if we assume that the county did not, as required  
6 by ORS 197.763(2), use the most recent property tax  
7 assessment rolls in generating its notice mailing list,  
8 petitioner cannot prevail. Notwithstanding any deficiencies  
9 in its mailing list, the county has established by  
10 affidavit, as required by ORS 197.763(8), that it sent  
11 notice of the hearings to the "current resident" at 28055  
12 N.W. Bacona Road, where petitioner resides and receives  
13 mail.<sup>8</sup> Because it was promptly mailed after the second  
14 notice, mailed on August 16, 1996 was returned, the notice  
15 should have arrived either before or just after the first  
16 planning commission hearing on August 21, 1996. Even if  
17 petitioner did not receive the notice prior to the first  
18 planning commission hearing, there were two more planning  
19 commission hearings and two county board hearings on the  
20 same application. The final decision was not made until  
21 October 22, 1996.

22 In Leonard we explained that the words "without

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<sup>8</sup>See petitioner's amended notice of intent to appeal (March 31, 1997), stating petitioner's mailing address as 28055 N.W. Bacona Road. See also Petitioner's Response to Respondent's Motion to Dismiss, Exhibits 4 and 6, which are letters dated March 18 and March 14, 1997 from the county planning division, addressed to petitioner at 28055 N.W. Bacona Road.

1 providing a hearing" in ORS 197.830(3)

2 "can be construed \* \* \* to encompass circumstances  
3 where, although a hearing may have been held, one  
4 or more persons effectively were not provided a  
5 hearing due to the local government's failure to  
6 provide them the notice of the hearing to which  
7 they were entitled. We adopt [this] construction,  
8 because a person is just as effectively denied his  
9 or her right to hearing in both circumstances.  
10 Cf. Flowers v. Klamath County, [98 Or App 384, 780  
11 P2d 227 (1989)] (local government may not rely on  
12 its own 'failure to provide notice and a hearing  
13 to defeat petitioners' ability to achieve standing  
14 to challenge the failure to provide them')." 24  
15 Or LUBA at 374.

16 The holding in Flowers, upon which we relied in Leonard, was  
17 based on the conclusion that

18 "a local government's failure to abide by the  
19 statutory procedures, a failure that bears  
20 directly on a petitioner's ability to appear,  
21 obviates the necessity for making a local  
22 appearance in order to have standing to challenge  
23 the government's noncompliance with the procedural  
24 requirements." 98 Or App at 389 (emphasis added).

25 Even if the county's notice of hearing was delivered to  
26 petitioner after the date of the first hearing, petitioner  
27 has not shown that he was denied his right to a hearing, as  
28 that right is described in Leonard and Flowers. The facts  
29 do not establish that petitioner was denied an opportunity  
30 to appear below. The notice mailed and, under ORS  
31 197.763(8), presumptively provided to petitioner was timely  
32 enough to allow an ample opportunity for petitioner to  
33 participate in the local proceedings. Nothing explains  
34 petitioner's delay of almost five months from the date of

1 the county's final decision before filing a notice of intent  
2 to appeal to LUBA.

3 **MOTION FOR EVIDENTIARY HEARING**

4 Petitioner moves for an evidentiary hearing in order to  
5 prove that the county did not properly generate its notice  
6 list. The board may grant a motion for an evidentiary  
7 hearing only if petitioner establishes by affidavit or  
8 otherwise that the facts to be presented in such a hearing  
9 would result in reversal or remand of the challenged  
10 decision, or that the facts to be presented would affect the  
11 outcome of the appeal. ORS 197.830(2)(b); OAR 661-10-045(1)  
12 and (2); Barber v. Marion County 23 Or LUBA 71, 73 (1992);  
13 McGinty v. Curry County, 17 Or LUBA 1111 (1989).

14 Because the county has demonstrated that it sent the  
15 required notice to petitioner's mailing address, the  
16 requested evidentiary hearing would serve no purpose. The  
17 motion for an evidentiary hearing is denied.<sup>9</sup>

18 This appeal is dismissed.

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<sup>9</sup>The county filed a "conditional motion for evidentiary hearing" in which it stated "if the Board does not grant [petitioner's motion for] an evidentiary hearing, Respondent's request will be automatically withdrawn." Respondent's Conditional Motion for Evidentiary Hearing. Since we deny petitioner's motion, we understand respondent's motion to be withdrawn.