BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GREG WARF and SUNDARA WARF,
*Petitioners,*

vs.

COOS COUNTY,
*Respondent,*

and

BLUE RIDGE INVESTMENTS,
LLC and ROBERT SMEJKAL,
*Intervenors-Respondent.*

LUBA No. 2002-010

FINAL OPINION
AND ORDER

Appeal from Coos County.

C. Randall Tosh, Coos Bay, represented petitioners.

Steven R. Lounsbury, Coquille, represented respondent.

Bill Kloos and Dan Terrell, Eugene, represented intervenors-respondent.

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

DISMISSED 04/18/2002

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

Opinion by Holstun.

## NATURE OF THE DECISION

Petitioners appeal a county decision that approves property line adjustments.

## MOTION TO INTERVENE

Blue Ridge Investments, LLC and Robert Smejkal, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

## RECORD OBJECTION

Petitioners object to the record filed by the county in this matter. In view of our disposition of the motion to dismiss, it is unnecessary to resolve petitioners' record objection.

## FACTS

In a letter dated October 31, 2001, the county planning director approved the challenged property line adjustments. Petitioners first learned of the October 31, 2001 property line adjustment decision on December 13, 2001.[1] On December 28, 2001, petitioners filed with the county a local appeal of the October 31, 2001 decision. Petitioners did not at that time file a separate appeal with LUBA. On January 4, 2002, the county's attorney advised petitioners that the planning department viewed property line adjustments as ministerial decisions and that the Coos County Zoning and Land Development Ordinance (CCZLDO) provided no right of local appeal to challenge ministerial decisions. On January 24, 2002, petitioners appealed the county's decision to LUBA.[2]

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[1]Petitioners were not given written notice of the decision when it was rendered on October 31, 2001. The record includes no written notice of the October 31, 2001 decision to petitioners, and it is not clear to us how petitioners received notice of that decision. However, petitioners concede that they received actual notice of the October 31, 2001 decision on December 13, 2001. Response to Intervenors-Respondent's Motion to Dismiss 1. For purposes of this opinion, we assume that is the case.

[2]Petitioners characterize the appealed decision as the county's October 31, 2001 property line adjustment decision, which only became final for purposes of appeal to LUBA when petitioners' attempted local appeal was denied on January 4, 2002. The January 4, 2002 letter is not included in the record, but a copy of that letter is attached to petitioners' January 24, 2002 notice of intent to appeal.

**MOTION TO DISMISS**

Intervenors contend that this appeal was not timely filed and for that reason must be dismissed. We summarize the parties' respective positions concerning the timeliness of this appeal before addressing the relevant CCZLDO and statutory provisions.

Intervenors contend that even if the challenged decision is correctly characterized as discretionary rather than ministerial, while petitioners were seeking a nonexistent local right of appeal, the deadline established under ORS 197.830(3) for petitioners to appeal the county's October 31, 2001 decision expired. *See Smith v. Douglas County*, 98 Or App 379, 780 P2d 232 (1989) (pursuit of nonexistent right of appeal does not suspend the statutory deadline for filing an appeal with LUBA); *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or LUBA 636, 640 (1994) (same). Petitioners, on the other hand, argue that their effort to exhaust their local appeal rights was required and that this appeal is therefore timely filed.

The controlling question that is presented by the motion to dismiss is whether petitioners' right of appeal on the date they first learned of the county's October 31, 2001 decision was governed by the procedure the county *should have followed* in making its October 31, 2001 decision or by the procedure the county *actually followed*. Our express or implied answer to that question in various contexts has evolved over time as relevant statutes and related appellate court cases have evolved. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766, 775-76 (2001); *Tarjoto v. Lane County*, 29 Or LUBA 408, 410-14 (and cases cited therein), *aff'd* 137 Or App 305, 904 P2d 641 (1995). However, for the reasons explained below, we now believe that 1999 amendments to ORS 197.830 make the answer to that question much more straightforward than it was under prior statutes.

### A. The October 31, 2001 Decision

CCZLDO 3.3.150 expressly authorizes the county planning department to approve property line adjustments.[3] However, with the exception of a recording requirement, CCZLDO 3.3.150 does not specify any particular procedure that the planning department must follow in approving a property line adjustment.[4] In this case the county did not follow the CCZLDO procedures for rendering administrative decisions that are described below. Instead, it viewed its decision as a ministerial decision. Based on that understanding, although there apparently are no express provisions for ministerial decision making in the CCZLDO, the county rendered its decision on October 31, 2001, without providing a written notice of administrative decision under CCZLDO 5.7.100(2).[5]

Petitioners dispute the county's characterization of the decision as "ministerial." Petitioners contend the county's decision involved the exercise of discretion and therefore should have been processed as an administrative decision.

Before turning to the parties' main argument, we agree with intervenors that if the challenged decision is a ministerial decision, in the sense that it does not involve the exercise of significant factual or legal discretion, LUBA would almost certainly lack jurisdiction,

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[3]As defined by CCZLDO 3.3.150 and ORS 92.010(7)(b) and (11), a property line adjustment involves relocating a common property line between two properties without creating an additional unit of land and without reducing the size of either of the affected properties below any required minimum lot or parcel size.

[4]CCZLDO 3.3.150(6) provides:

> "The governing body, or [its] designee, may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines described in ORS 92.010(11), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060(7)."

[5]As relevant, CCZLDO 5.7.100(2) provides that "[n]otice of an administrative decision shall be mailed to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located [certain specified distances from the property that the subject of the administrative decision]." The challenged decision is a one-page letter that is addressed to intervenors' agent. Record 1. The letter includes no notice of any right of appeal and no separate notice of decision was given. Apparently no adjoining property owners were provided copies of the letter. *See* n 2.

even if an appeal to LUBA were timely filed. ORS 197.015(10)(b)(A).[6] Accordingly, for purposes of this decision, we assume without deciding that petitioners are correct that the challenged decision required the exercise of discretion and for that reason is accurately viewed as a "permit" decision, as that term is defined by ORS 215.402(4).[7] *See Goddard v. Jackson County*, 34 Or LUBA 402, 411 (1998) (concluding that the property line adjustments in that case required the exercise of sufficient factual and legal judgment to make the ministerial exception at ORS 197.015(10)(b)(A) inapplicable); *Thompson v. City of St. Helens*, 30 Or LUBA 339, 343 (1996) (same).

**B. Administrative Decisions Under the CCZLDO**

CCZLDO Article 5.8 governs local appeals of "[d]iscretionary [d]ecisions." The county apparently interprets "administrative decisions" to include discretionary decisions that are rendered by planning staff without a prior public hearing.[8] Other discretionary decisions may be rendered initially by a hearings body and require a prior public hearing.[9] Under the county's view of CCZLDO Article 5.8, it applies only to *discretionary* decisions and therefore does not apply to *ministerial* decisions.

When the county renders administrative decisions, the CCZLDO requires that the county provide written notice of the administrative decision and provide an opportunity for a

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[6]As relevant here, LUBA's jurisdiction is limited to land use decisions. ORS 197.825(1). Under ORS 197.015(10)(b)(A) decisions that are "made under land use standards which do not require interpretation or the exercise of policy or legal judgment," are not land use decisions.

[7]ORS 215.402(4) provides:

> "'Permit' means 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. * * *"

[8]The CCZLDO does not include a definition of "administrative decision."

[9]No party contends that a prior public hearing was required in this matter or that a decision by a hearings body was required under the CCZLDO.

local appeal. CCZLDO 5.7.100(2) sets out detailed requirements for written notice of administrative decisions. Relevant provisions are set out below:

> "(e) Content of a mailed notice of [administrative] decision shall include the following:
>
> > "(i) Explain the nature of the application and the proposed use or uses which could be authorized;
> >
> > "* * * * *
> >
> > "(iii) State any person who is adversely affected or aggrieved or who is entitled to written notice of this [administrative] decision may appeal the decision to the Planning Commission by filing a written appeal pursuant to Article 5.8 of the Ordinance.
> >
> > "(iv) Describe the nature of the [administrative] decision.
> >
> > "* * * * *
> >
> > "(vii) State the [administrative] decision *will not become final until the period for filing an appeal has expired*.
> >
> > "(viii) State that appeals of the [administrative] decision *cannot be appealed directly to the Land Use Board of Appeals under ORS 197.830*.
>
> "* * * * *
>
> "(g) State the [administrative] decision *will not become final until the period for filing an appeal has expired*.
>
> "(h) State that appeals of the [administrative] decision *cannot be appealed directly to the Land Use Board of Appeals under ORS 197.830*." (Emphases added.)

CCZLDO 5.7.100(2) makes it clear that there is a right to a local appeal to challenge administrative decisions. It twice states that there is *no right to a direct appeal to LUBA* to challenge such decisions and that such decisions do not become final until the time for filing that local appeal has run.

The notice and opportunity for local appeal process that is described above generally parallels statutory requirements for rendering permit decisions without first providing a

public hearing. ORS 215.416(11) (counties); ORS 227.175(10) (cities). *See Wilbur Residents v. Douglas County*, 151 Or App 523, 528, 950 P2d 368 (1997) (describing the statutory procedure).[10]

**C. Finality**

As relevant here, LUBA's jurisdiction is limited to land use decisions. As defined by ORS 197.015(10)(a) a land use decision must be a final decision. Under OAR 661-010-0010(3):

> "A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance."

From its appearance, the October 31, 2001 decision is final. It is in writing and is signed. The letter does not indicate that there is any right of local appeal. While it is clear that petitioners believe the county should have utilized administrative decision making procedures to rule on the requested property line adjustments, it is equally clear that the county did not do so. No party argues that there is a local right of appeal to challenge county ministerial decisions. Putting aside the merits of the county's decision to approve the disputed property line adjustments ministerially, rather than through its administrative decision making procedure, it is clear that the October 31, 2001 decision was final when it was rendered, in the sense it was reduced to writing, signed by the local decision maker and no local law delayed finality.

We address the closely related requirement of exhaustion of administrative remedies next.

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[10]The critical feature of the statutorily required procedure is that the permit decision may be rendered without the necessity of a prior public hearing provided: (1) written notice is given to the same persons who would have been entitled to notice of a public hearing, if a prior public hearing had been held, and (2) such persons who are entitled to notice, and any persons who are not entitled to written notice, but are adversely affected or aggrieved by the decision, are provided an opportunity for a local *de novo* appeal.

### D. Exhaustion of Local Appeals in Cases Where a Land Use Decision is Rendered Without Providing a Hearing

#### 1. The Requirement to Exhaust Local Remedies that are Available by Right

Under ORS 197.825(2), our jurisdiction to review land use decisions is conditioned on a petitioner first exhausting any local right of appeal that is "available by right."[11] Because ORS 197.825(2)(a) requires that petitioners first exhaust any available local appeal, petitioners in this appeal correctly considered whether any such local appeal was "available by right." Had the county approved the requested property line adjustments pursuant to its administrative decision making procedures, as petitioners contend it should have done, and contemporaneously provided petitioners written notice of its October 31, 2001 decision, it is clear that petitioners would have had a right of local appeal.

Even though the county did not render its October 31, 2001 decision pursuant to its administrative decision making procedure, and did not provide written notice of its October 31, 2001 decision to petitioners, petitioners somehow received actual notice of the decision 43 days later, on December 13, 2001. CCZLDO 5.8.200 requires that an appeal of an administrative decision must "be filed within fifteen (15) days of the date notice of decision was mailed." We understand petitioners to contend that because the county did not contemporaneously mail written notice of the October 31, 2001 decision to petitioners and petitioners filed their local appeal within 15 days of the date they first learned of the decision, their local appeal was timely filed under CCLDO 5.8.200. We also understand petitioners to argue that that local appeal was not exhausted until the county attorney sent the January 4, 2002 letter denying that appeal to petitioners.

In arguing that this appeal is timely filed, petitioners rely on two critical contentions. First, that the challenged decision is discretionary and therefore should have been rendered

[11]ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]"

as an administrative decision (as that term is used in the CCZLDO) and a permit (as that term is defined at ORS 215.402(4)). *See* n 7. Second, petitioners contend that the county was required in this case to provide the local appeal that is required by CCZLDO 5.7.100(2)(e)(iii) and Article 5.8 and ORS 215.416(11), even though the county did not purport to make its decision as an administrative decision under the CCZLDO or a permit decision under ORS 215.416(11).

Assuming petitioners' two critical contentions are correct, and reading CCZLDO 5.7.100(2)(e)(iii) and (viii) and 5.7.100(2)(g) and (h) in isolation, it is understandable that petitioners would heed the twice stated advice that (1) their right of local appeal must first be exhausted and (2) there is no direct route of appeal to LUBA to challenge a planning department administrative decision. However, although we assume without deciding that petitioners' first contention is correct, we do not agree with their second contention.

As we explain below, ORS 197.830(3) and (4) now comprehensively govern the timing and deadlines for appeal of land use decisions that are rendered without a prior local hearing. For purposes of resolving the motion to dismiss, we assume the county is wrong about the ministerial nature of the challenged decision and that it should have been adopted pursuant to the county's administrative decision making procedures, which call for notice and an opportunity for local appeal. Under ORS 197.830(3), when petitioners discovered the county's error, their only remaining right of appeal was to LUBA under ORS 197.830(3)(a).

**2. The ORS 197.830(3) Right to Directly Appeal to LUBA Where Land Use Decisions are Rendered Without a Prior Hearing**

In 1989, the legislature first amended ORS 197.830 expressly to provide a right to appeal land use decisions directly to LUBA where those decisions are rendered without a prior local hearing.[12] In a case decided by LUBA in 1995, we explained that before this

[12]As adopted in 1989, ORS 197.830(3) provided as follows:

1989 legislation took effect, LUBA had determined under prior statutes and appellate court decisions that interpreted and applied those statutes, that "any time period set by the local code for filing a local appeal does not begin to run until the required notice of the decision is provided" under ORS 215.416(11) and 227.175(10). *Tarjoto*, 29 Or LUBA at 412 n 4. In other words, under the pre-1989 statutes, where petitioners learned, after the fact, that a land use decision had been rendered without first providing a hearing, such petitioners were first required to exhaust any available local remedies before appealing to LUBA, and the local deadlines for seeking those remedies did not begin to run until such petitioners received actual notice of the decision. Under that tolling doctrine, petitioners' decision to pursue a local appeal rather than pursue an appeal directly to LUBA would almost certainly have been the correct choice.

In *Tarjoto*, we read ORS 197.830(3), the ORS 215.416(11) provisions specifically authorizing permit decisions without a hearing and the ORS 197.825(2)(a) exhaustion of local remedies requirement together and concluded that ORS 197.830(3) did not authorize a direct appeal to LUBA in the circumstances presented in that case. We reached that conclusion in *Tarjoto* because the county failed to provide the petitioner notice of its permit decision, as required by ORS 215.416(11). We concluded that that failure tolled the time for the petitioner to file a local appeal until the county provided the petitioner the notice of decision to which he was entitled. Finally, we concluded that that local appeal must be exhausted before an appeal at LUBA was available. 24 Or LUBA at 414. Because the

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"If a local government makes a land use decision without providing a hearing * * * 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."

petitioner in *Tarjoto* had not exhausted his local appeal before appealing directly to LUBA, we dismissed the appeal.

LUBA's opinion in *Tarjoto*, and the Court of Appeals' decision that affirmed that decision, both have some bearing on the ultimate issue that is presented here. We therefore discuss those opinions below before turning to the current language of ORS 197.830, which controls here.

In *Tarjoto*, as in the present case, the county's land use decision was rendered without providing a hearing. However, the facts in *Tarjoto* differ from the relevant facts in this case in at least two important respects. First, in *Tarjoto*, the county was attempting to adopt a decision pursuant to ORS 215.416(11) and its local code equivalent. The county's failure to provide the required notice of decision to the petitioner was due to an oversight. Here the county was proceeding under its arguably incorrect assumption that its decision was nondiscretionary and therefore required neither a hearing nor the notice of administrative decision and opportunity for local appeal that are required by the CCZLDO and ORS 215.416(11). A second important difference in *Tarjoto* is that the petitioner filed both a local appeal and a direct appeal to LUBA under ORS 197.830(3), and the county agreed to grant the petitioner's request for a local appeal. Here petitioners did not file a direct appeal to LUBA at the same time they filed their local appeal on December 28, 2001, and the county refused petitioners' attempted local appeal of the October 31, 2001 property line adjustment decision.

As noted earlier, LUBA held in *Tarjoto* that because ORS 215.416(11) specifically authorizes permit decisions without a prior hearing, ORS 197.830(3) did not apply, and ORS 197.825(2) required that the petitioner seek and exhaust his local remedy before appealing to LUBA. It is reasonably clear that the Court of Appeals did not agree with our holding. The court limited its decision to affirm LUBA to the undisputed fact in that case that the county was willing to and in fact did provide the petitioner a local appeal. The Court of Appeals

expressly left open the possibility that ORS 197.830(3) would provide the petitioner a direct right of appeal to LUBA if the circumstances were otherwise:

> "We need not decide and we reserve judgment about the relative effects and applicability of ORS 197.830(3) and ORS 215.416(11)(a) to facts that differ from those here. For example, we do not reach the question of whether petitioner could have appealed directly to LUBA under ORS 197.830(3) after learning of the planning director's decisions, had he not also appealed to the hearings officer and thereby obtained rulings from the county, LUBA and us that the local remedy is 'available' within the meaning of ORS 197.825(2)(a).
>
> "Whatever their precise relationship may be, ORS 197.830(3) and ORS 215.416(11) are not designed to foster gamesmanship on the part of parties or decision makers, of the kind that petitioner hypothesizes, *e.g.*, in which 'local remedies' are artificially fabricated or interpreted as being 'unavailable' in an effort to defeat the possibility of timely LUBA appeals. Petitioner describes LUBA's interpretation of the relationship of the two statutes as creating a 'jurisdictional hall of mirrors.' If that description is meant to imply that either the statutes or the way that LUBA applied them create the risk of a jurisdictional void, we disagree. We think the intended effect of the statutes is the opposite, *i.e.*, to provide adequate procedures to prevent cases from slipping through jurisdictional cracks. LUBA's decision gives effect to that intent, and we hold that it did not err." 137 Or App at 310-11 (footnote omitted).

We believe the clearest inference from the above-quoted language is that the Court of Appeals viewed ORS 197.830(3) as a legislative attempt to eliminate the jurisdictional confusion that is created where a land use decision is rendered without a hearing and parties belatedly learn of the decision. In short, the legislature adopted ORS 197.830(3) to provide a right of direct appeal to LUBA in such cases, except in cases where the petitioners also seek a local appeal and, for whatever reason, the local government grants a local appeal.

**3. 1999 Amendments to ORS 197.830**

Without regard to whether we correctly understand the import of the above-quoted language from the Court of Appeals' decision in *Tarjoto*, the legislature further amended ORS 197.830 in 1999 to modify ORS 197.830(3) to specifically exclude application of that subsection of the statute in situations where a decision is rendered pursuant to ORS 215.416(11) or 227.175(10). The legislature also added a new section, which is now codified

at ORS 197.830(4), that specifically addresses such permit decisions rendered pursuant to ORS 215.416(11) or 227.175(10). Relevant provisions of the current version of ORS 197.830 are set out below:

> "(1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.
>
> "* * * * *
>
> "(3) 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:
>
> > "(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.
>
> "(4) If a local government makes a land use decision without a hearing *pursuant to ORS 215.416 (11) or 227.175 (10)*:
>
> > "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.
> >
> > "(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).
> >
> > "(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.

> "(d) Except as provided in paragraph (c) of this subsection, a person who receives mailed notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the board under this section.
>
> "* * * * *
>
> "(9) 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. * * *"

Although it has been amended over the years, the generally applicable statutory deadline for filing an appeal with LUBA appears at ORS 197.830(9), set out above. Read in context with ORS 197.830(3) and (4), ORS 197.830(9) applies in cases where at least one local hearing is provided and it establishes a deadline of 21 days after the decision becomes final or 21 days after notice is mailed, depending on the type of decision. ORS 197.830(3) and (4) now address the deadlines for appealing land use decisions to LUBA in all cases where a local hearing is not provided in advance of the decision. As explained below, ORS 197.830(4) governs permit decisions that are rendered "without a hearing pursuant to ORS 215.416 (11) or 227.175 (10)." ORS 197.830(3) governs all other cases where a land use decision is rendered without providing a hearing, including any case where the decision arguably should have been rendered pursuant to ORS 215.416(11) or 227.175(10), but was not rendered pursuant to those statutes.

ORS 197.830(4) now comprehensively addresses the situation where a "local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10)." Where the local government attempts to render a permit decision pursuant to ORS 215.416 (11) or 227.175 (10), but fails to provide notice of the decision to a person who is entitled to such written notice of the decision, that person may appeal to LUBA "within 21 days of receiving actual notice of the decision." ORS 197.830(4)(a). If the city or county

gives the required notice of a permit decision under ORS 215.416 (11) or 227.175 (10) to a person, but the notice does "not reasonably describe the nature of the decision," the 21-day deadline for that person to appeal to LUBA begins on the date the person receives actual notice of the nature of the decision. ORS 197.830(4)(c). Those persons who were not entitled to written notice of a permit decision that is rendered pursuant to ORS 215.416 (11) or 227.175 (10), but are adversely affected or aggrieved by the permit decision, may appeal directly to LUBA, but must do so "within 21 days after the expiration of the period for filing a local appeal of the decision[.]" ORS 197.830(4)(b). Finally, the statute makes it clear that persons who are given written notice of a permit decision that is rendered pursuant to ORS 215.416 (11) or 227.175 (10) and provided the opportunity for a local appeal must first exhaust that local appeal before they may appeal to LUBA. ORS 197.830(4)(d).

However, it is clear from the text and context of ORS 197.830(4) that this subsection of ORS 197.830 *only* applies where the local government is making "a land use decision without a hearing *pursuant to ORS 215.416(11) or 227.175(10)*[.]" (Emphasis added.) The county decision that is challenged in this appeal was not rendered pursuant to ORS 215.416(11) or the CCZLDO provisions that implement that statute. Rather, the county's decision was rendered pursuant to the county's arguably erroneous belief that its decision was ministerial and therefore could be rendered without a hearing and without following the county's administrative decision making procedures. The county may well have been incorrect in that belief, but it is clear from the record that it was not *proceeding pursuant to ORS 215.415(11)* or the above-quoted county administrative decision procedures that implement that statute.

We conclude that ORS 197.830(4) only applies where a local government is attempting to render a permit decision without a prior hearing "pursuant to ORS 215.416(11)

or 227.175(10)."[13] We also conclude that ORS 197.830(3) applies in all other cases where a local government adopts a land use decision without providing a hearing, including cases where the local government mistakenly believes its decision is not a discretionary "permit" decision, as that term is defined by ORS 215.402 and 227.160(2), and for that reason does not provide the required notice of decision and opportunity for a local appeal.

The conclusion we have just reached in not consistent with our recent decision in *Neighbors for Sensible Dev.*, 39 Or LUBA at 775-76, in which we concluded the choice between ORS 197.830(3) and (4), in cases where a local government is arguably mistaken about whether ORS 215.416(11) or 227.175(10) applies, is governed by the procedure that the local government *should have followed* rather than the procedure it *actually followed*. We now believe that the choice between ORS 197.830(3) and (4) is governed by the procedure the local government actually followed, and our contrary conclusion in *Neighbors for Sensible Dev*. is overruled.

Returning to the present case, there is no dispute that the county rendered its decision without a hearing. There is also no dispute that the county did not render its decision pursuant to ORS 215.416(11) or the CCZLDO provisions that implement that statute. Therefore, ORS 197.830(3) applies. Under ORS 197.830(3)(a), such decisions may be appealed to LUBA "[w]ithin 21 days of actual notice where notice is required." Under ORS 197.830(3)(b), such decisions may be appealed to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required."

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[13]In most if not all cases, the question of whether the local government is attempting to adopt a permit decision "pursuant to ORS 215.416(11) or 227.175(10)" will be answered by determining whether the local procedures that the local government followed or attempted to follow are the local procedures that implement ORS 215.416(11) or 227.175(10). It is clear in the present appeal that the county did not follow and was not attempting to follow the county's administrative decision making procedures that implement ORS 215.416(11). CCZLDO 5.7.100(2), which was set out in part earlier in the text, imposes a number of detailed requirements for notice of an administrative decision rendered without a prior hearing. The October 31, 2001 decision makes no attempt to comply with those requirements.

If, as petitioners allege, the county erroneously adopted its decision without observing the procedural requirements of ORS 215.416(11) or the CCZLDO provisions that implement that statute, petitioners were entitled to written notice of that decision, and ORS 197.830(3)(a) applies.[14] Therefore, petitioners were entitled to appeal the October 31, 2001 decision directly to LUBA within 21 days after they received actual notice of that decision on December 13, 2001. Instead petitioners attempted to file a local appeal. As previously noted, the county advised petitioners on January 4, 2002, that there was no right to a local appeal to challenge its October 31, 2001 decision. By the time petitioners filed their appeal at LUBA on January 24, 2002, the deadline for filing their appeal to LUBA under ORS 197.830(3)(a) had expired. Because petitioners' January 24, 2002 appeal was not timely filed, this appeal must be dismissed. *Smith*, 98 Or App at 382-83.

The variety of notice and other local procedural errors that are possible in rendering land use decisions, along with the often complicated interrelationship between ORS 197.830(3), (4) and (9) and the statutory exhaustion requirement of ORS 197.825(2), invite confusion about whether a right of local appeal exists to challenge a local government decision or whether the only right of appeal to challenge that decision lies at LUBA. Overlapping and duplicative local land use procedural provisions, which in some cases are inconsistent with statutory requirements, often add to the possible confusion. This potential for confusion makes caution consistently appropriate. When confronting uncertainty among relevant statutes and local procedural provisions, if there is any doubt about the proper venue for appeal and the deadline for such an appeal, the filing of timely precautionary appeals with all possible review bodies is the only safe course of action. Had petitioners filed a precautionary appeal with LUBA at the same time they filed their attempted local appeal of the October 31, 2001 decision on December 28, 2001, the county might have elected to allow

[14]Petitioners assert, and intervenors do not dispute, that as adjacent property owners they would have been entitled to written notice of the decision if administrative decision making procedures had been followed.

the local appeal even if one were not required under the CCZLDO. If the county had done so, even under the current version of ORS 197.830(3) and (4), that local appeal would likely have had to be exhausted under the Court of Appeals' reasoning in *Tarjoto* before an appeal would be available at LUBA. On the other hand, if the county determined that the local appeal was not available, as it did here, then the precautionary LUBA appeal would be available to allow review of the decision on the merits.

Because petitioners' January 24, 2002 LUBA appeal of the county's October 31, 2001 decision was filed more than 21 days after petitioners received actual notice of the decision on December 13, 2001, the appeal was not timely filed. This appeal is therefore dismissed.