BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RONALD D. MURRAY,
*Petitioner,*

vs.

MULTNOMAH COUNTY,
*Respondent,*

and

COLUMBIA RIVER GORGE COMMISSION,
*Intervenor-Respondent.*

LUBA No. 2007-191

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Ronald D. Murray, Portland, filed the petition for review and argued on his own behalf.

Sandra N. Duffy, Assistant County Attorney, Portland, filed a response brief and argued on behalf of respondent.

Jeffrey B. Litwak, White Salmon, filed a response brief and argued on behalf of intervenor-respondent.

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

DISMISSED 03/27/2008

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

Petitioner appeals Ordinance 1097, which amends eight county code chapters to add criteria for replatting and consolidating lots and parcels.

## MOTION TO INTERVENE

The Columbia River Gorge Commission (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.[1]

## FACTS

As part of a larger code review process, in 2005 the county planning commission began considering code amendment recommendations to resolve various problems with existing land divisions, including the absence of code provisions governing lot or parcel consolidation. The planning commission held several work sessions throughout 2006, culminating in proposed amendments that would make replatting and lot consolidation uses that are listed in each of the county's zoning districts, and adopt criteria for replatting and consolidating lots and parcels.

On February 16, 2007, the county sent notice of the proposed amendment to the Department of Land Conservation and Development (DLCD), pursuant to ORS 197.610. The planning commission held a public hearing on the proposed amendments on April 2, 2007, and at the end of that hearing adopted a resolution recommending that the board of county commissioners (BCC) approve the proposed amendments.

[1] Intervenor filed a response brief arguing that LUBA does not have jurisdiction to consider an issue in this appeal related to amendments to Chapter 38 of the Multnomah County Code, which governs lands within the county that are subject to the Columbia River Gorge National Scenic Area Act. Intervenor seeks an order either dismissing this appeal to the extent the appeal applies to Chapter 38, or an order stating that all issues relating to implementation of the Act have been statutorily waived by filing of this appeal with LUBA, pursuant to ORS 196.115(2)(e). Because we dismiss the appeal in its entirety for reasons unrelated to intervenor's concerns, we need not and do not address intervenor's arguments.

The county scheduled a public hearing before the BCC on July 12, 2007. Publication notice of the hearing occurred ten days prior to the hearing, on July 2, 2007. At the July 12, 2007 hearing, the proposed ordinance had a first reading. A second reading was scheduled for July 26, 2007. The county did not publish notice of the July 26, 2007 meeting.

Following a second reading at the July 26, 2007 meeting, the BCC adopted Ordinance 1097. The ordinance amends Multnomah County Code (MCC) chapters 11.15, 11.45, 33, 34, 35, 36, 37 and 38 to make replatting and consolidation of lots and parcels a listed use in each of the county's zoning districts. Ordinance 1097 also creates a set of procedures and standards for replatting and consolidating lots and parcels.

On August 2, 2007, the county mailed to DLCD the notice of adoption required by ORS 197.615(1). Approximately seven weeks later, on September 25, 2007, petitioner filed with LUBA a notice of intent to appeal Ordinance 1097.

**MOTION TO STRIKE AFFIDAVITS**

The county moves to strike a September 25, 2007 affidavit from petitioner, that is attached to the notice of intent to appeal. The same affidavit is attached to the petition for review, along with a second affidavit from petitioner, dated December 10, 2007, that the county does not include in the motion to strike. Both affidavits describe petitioner's contacts with county planning staff with regard to a number of subdivision lots petitioner acquired on May 30, 2007, that are apparently substandard in size under current county zoning. The affidavits indicate that petitioner spoke with staff regarding his intent to eliminate property lines between some of the lots, thus eliminating some lots and increasing the size of the remaining lots, resulting in what petitioner hoped would be five or six buildable lots. Further, the affidavits indicate that petitioner believes Ordinance 1097 will make it difficult or expensive to accomplish the lot configuration that petitioner desires, and that petitioner first learned of Ordinance 1097 in a conversation with county staff on September 6, 2007.

The county argues that the September 25, 2007 affidavit asserts facts not in the record, and that petitioner has not moved to take evidence not in the record under OAR 661-010-0045, or otherwise cited any basis for LUBA to consider those factual allegations. In the event that LUBA considers the September 25, 2007 affidavit, the county submits the affidavits of two county planning staff controverting some of the factual assertions in petitioner's September 25, 2007 affidavit.

With limited exceptions, our review is confined to the local record. ORS 197.835(2)(a). The principle exception is pursuant to a motion to take evidence under OAR 661-010-0045. However, on several occasions we have held that we may consider documents attached to the parties' pleadings, even without a motion under OAR 661-010-0045, for the limited purpose of determining whether we have jurisdiction over the challenged decision. *Yost v. Deschutes County*, 37 Or LUBA 653, 658 (2000); *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988). As discussed below, the county argues, and we agree, that LUBA lacks jurisdiction over this appeal. Accordingly, we shall consider petitioner's affidavits, as well as the county's counter-affidavits, for the limited purpose of determining whether we have jurisdiction over the appeal.

**MOTION TO STRIKE RESPONSE BRIEF**

Petitioner moves to strike the county's response brief, because it was filed one day later than the date specified in the Board's order granting an extension of time to file the response brief. The motion is denied. OAR 661-010-0005.

**MOTION TO STRIKE SUPPLEMENTAL POST-HEARING MEMORANDUM**

Following oral argument, petitioner submitted a four-page supplemental memorandum that supplements the arguments made in the petition for review and at oral argument. The county moves to strike the memorandum. We agree with the county that our rules do not provide for submission of post-oral argument pleadings, that the Board did not

authorize any such pleading, and that petitioner has not requested or established any basis for the Board to consider the memorandum. The motion to strike is granted.

**JURISDICTION**

The county moves to dismiss this appeal, arguing that petitioner failed to appear before the county during the proceedings below, and thus lacks standing under ORS 197.620(1). In addition, the county argues that petitioner's appeal was untimely filed. For the reasons set out below, we agree with the county that the appeal was not timely filed, and that petitioner lacks standing to appeal. Because the arguments regarding standing and timely appeal are inextricably entwined, we will discuss both sets of contentions together.

The challenged decision is a post-acknowledgment plan or land use regulation amendment (PAPA) subject to the requirements of ORS 197.605 *et seq*. ORS 197.620(1) provides that "persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to [LUBA] under ORS 197.830 to 197.845."[2] The county argues, and petitioner does not dispute, that petitioner did not "participate either orally or in writing" in the county's proceedings leading to the adoption of Ordinance 1097. Therefore, the county argues, petitioner lacks standing to appeal Ordinance 1097.

The second sentence of ORS 197.830(9) sets out the deadline for appealing a PAPA decision to LUBA, requiring that the appeal "shall be filed not later than 21 days after notice

[2] ORS 197.620(1) provides:

> "**Who may appeal.** (1) Notwithstanding the requirements of ORS 197.830(2), persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. A decision to not adopt a legislative amendment or a new land use regulation is not appealable except where the amendment is necessary to address the requirements of a new or amended goal, rule or statute."

of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615."[3] A person is entitled to notice of the decision under ORS 197.615 if the person "participated" in the proceedings leading to adoption of the decision, and requested that the local government provide notice of the decision.[4] According to the county, it mailed notice of the adoption of Ordinance 2097 to DLCD and all other parties who were entitled to notice under ORS 197.615 on August 2, 2007. Therefore, the county argues, under the second sentence of ORS 197.830(9), the deadline for filing a notice of intent to appeal Ordinance 1097 was 21 days later, or August 24, 2007. Because petitioner's appeal was filed long after that date, the county argues, the appeal is untimely.

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[3] 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. * * *"

[4] ORS 197.615 provides, in relevant part:

> "(1) A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the Director of the Department of Land Conservation and Development a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. * * *
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> "(2)(a) On the same day that the text and findings are mailed or delivered, the local government also shall mail or otherwise submit notice to persons who:
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> "(A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation or the new land use regulation; and
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> "(B) Requested of the local government in writing that they be given such notice."

In anticipation of those arguments, petitioner includes a lengthy analysis of standing and jurisdiction in the petition for review.[5] Petitioner contends that the appeal deadlines in the present case are governed by ORS 197.830(3), not ORS 197.830(9). Further, petitioner argues that his failure to participate in the proceedings below is excused due to the county's failure to provide him with individual written notice of the proposed amendments, and other procedural notice defects discussed below.

ORS 197.830(3) provides, in relevant part:

> "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), * * * a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

We disagree with petitioner that ORS 197.830(3) provides the applicable appeal deadlines in the present case. As an initial matter, ORS 197.830(3) applies only when, in relevant part, the local government "makes a land use decision without providing a hearing[.]" Petitioner acknowledges that the county in fact provided at least two public hearings leading to the adoption of Ordinance 1097. Nonetheless, petitioner argues that the county failed to provide a "hearing" *as to petitioner*, and therefore ORS 197.830(3) provides the applicable appeal deadlines, under the reasoning in *Leonard v. Union County*, 24 Or LUBA at 374-76.

In *Leonard*, we held in relevant part that ORS 197.830(3) potentially applies where the local government conducts a hearing but "fails to give a person the individual notice of hearing he or she is entitled to receive under state or local law[.]" *Id.* at 374-75. The

[5] In fact, the petition for review consists almost entirely of arguments regarding standing and jurisdiction. The section of the brief entitled "Assignments of Error" consists simply of an incorporation of petitioner's arguments regarding standing.

decision at issue in *Leonard* was a legislative PAPA. We concluded that, while no statute required that petitioners receive individual written notice of the county hearings on a legislative land use decision, the county's code *did* require such notice and the county had failed to provide it. Extending the reasoning in *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989), we concluded that the county's failure to provide petitioner with code-required individual written notice of the hearing meant that the county had failed to "provid[e] a hearing" as to petitioner, thus making the appeal deadlines in ORS 197.830(3) potentially controlling instead of the appeal deadlines in what is now ORS 197.830(9).[6] We ultimately concluded in *Leonard* that the petitioners failed to file a timely appeal under ORS 197.830(3)(b).

As petitioner acknowledges, in *Orenco Neighborhood Organization v. City of Hillsboro*, 135 Or App 428, 432, 899 P2d 720 (1995), the Court of Appeals overturned the actual holding of *Leonard*. *Orenco* also involved a legislative PAPA and an alleged failure to provide individual written notice as required under a local code provision. The Court concluded that failure to adhere to a *local* prehearing notice requirement cannot "alter the time at which an unappealed amendment is deemed acknowledged under [197.610 to ORS 197.625] or to extend the period for appealing such an amendment beyond the time that it has been deemed acknowledged under the statutes."[7] The Court was not required to and

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[6] ORS 197.830(9) was then numbered ORS 197.830(8).

[7] The Court stated:

> "The crux of petitioners' position is that the time provided by ORS 197.830([9]) may be extended pursuant to ORS 197.830(3) if certain locally prescribed procedures are not satisfied. However, ORS 197.610 to ORS 197.625 comprehensively govern the procedures applicable to post-acknowledgment amendments and additions to local land use legislation. The appeal period defined in ORS 197.830([9]) is an integral part of those procedures. Under ORS 197.625(1), the new or amended local legislation 'shall be considered acknowledged' if, *inter alia*, 'no notice of intent to appeal is filed within the 21-day period set out in ORS 197.830([9]).' Conversely, if an appeal is taken within that time, the amendment or new legislation is not deemed acknowledged until the time that a LUBA or judicial decision affirming it becomes final. ORS 197.625(1), (2).

did not address the possibility that *Leonard* might have some continued vitality where a *statute* requires prehearing notice to the petitioner and the local government fails to provide that statutory notice. It is that remaining aspect of *Leonard* that petitioner now seeks to invoke, arguing that two statutes required the county to provide petitioner with individual written notice of the hearings on Ordinance 1097. Further, petitioner seeks to expand the *dicta* in *Leonard* to include failure to provide publication notice as required by statute. We now turn to those arguments.

**A. Legislative versus Quasi-Judicial**

Petitioner first contends that Ordinance 1097 is a quasi-judicial rather than legislative decision, and thus ORS 197.763 required the county to provide individual written notice to owners of property located within a prescribed distance from the property that is the subject of a quasi-judicial land use decision.[8] According to petitioner, Ordinance 1097 satisfies the

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> "Under petitioners' reading, ORS 197.830(3) makes it possible for a local notice provision, which has no analog in state statutes, either to alter the time at which an unappealed amendment is deemed acknowledged under those statutes or to extend the period for appealing such an amendment beyond the time that it has been deemed acknowledged under the statutes. Either of those effects would distort the roles that the post-acknowledgment statutes assign to the appeal process and to the finality of acknowledgments. In the light of their text and context, it is not plausible to interpret ORS 197.830(3) and ([9])--as petitioners do--as allowing the fundamental operation of the statutory post-acknowledgment process to be a variable of, or a hostage to, locally adopted procedures." 135 Or App at 432.

[8] ORS 197.763 sets out the procedures that "govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision * * *." ORS 197.763(1). Specifically, ORS 197.763(2)(a) requires that:

> "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:
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> "(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;
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> "(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
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> "(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."

three criteria for a quasi-judicial decision, as described in *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979).[9] Petitioner particularly emphasizes that Ordinance 1097 satisfies the third factor, a decision that is "directed at a closely circumscribed factual situation or a relatively small number of persons." Petitioner contends that the replatting and lot consolidation provisions of Ordinance 1097 are intended to and will likely affect only a relatively small number of property owners, such as petitioner, who own substandard size lots in subdivisions that were platted prior to modern subdivision regulations.

The county responds, and we agree, that Ordinance 1097 is clearly legislative rather than quasi-judicial in character under the *Strawberry Hill* factors. Ordinance 1097 adopts text amendments that by their terms apply in every zoning district in the county, potentially to every property in the county. There is nothing cited to us in Ordinance 1097 that purports to limit the applicability of its text amendments to a small number of property owners, much less to any particular piece of property. Petitioner has not established that the ordinance is "directed at a closely circumscribed factual situation or a relatively small number of persons." Nor has petitioner established that the process leading to adoption of Ordinance 1097 was "bound to result in a decision," or that the county was "bound to apply preexisting criteria to concrete facts." As far as petitioner has established, the county could have simply tabled the proposed ordinance at any time. Further, petitioner identifies no "criteria" the county applied to any "concrete facts." Because adoption of Ordinance 1097 was not a quasi-judicial decision, it follows that the notice requirements of ORS 197.763 did not apply.

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[9] In *Leonard*, we summarized the three *Strawberry Hill* 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?" 24 Or LUBA at 368.

**B. Ballot Measure 56 Notice**

Ballot Measure 56, adopted in 1998 and codified in relevant part at ORS 215.503, requires that the county provide to certain property owners individual written notice of the first hearing on a comprehensive plan amendment or a proposal to rezone their property.[10] Petitioner contends that Ordinance 1097 "rezones" his property within the meaning of ORS 215.503(4) and ORS 215.503(9)(b), and therefore the county was required to provide him, or more precisely his predecessor-in-interest, with individual written notice of the county's first public hearing on Ordinance 1097.

The recitals for Ordinance 1097 state that "[n]o regulations are being proposed that further restrict the use of property and no mailed notice to individual property owners is required ('Ballot Measure 56' notice)." Record 81. ORS 215.503(9) provides that "property is rezoned" when the governing body of the county either (1) changes the base zoning

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[10] ORS 215.503 provides, in relevant part:

> "(3) Except as provided in subsection (6) of this section and in addition to the notice required by ORS 215.060, at least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to amend an existing comprehensive plan or any element thereof or to adopt a new comprehensive plan, the governing body of a county shall cause a written individual notice of land use change to be mailed to each owner whose property would have to be rezoned in order to comply with the amended or new comprehensive plan if the ordinance becomes effective.
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> "(4) In addition to the notice required by ORS 215.223 (1), at least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, the governing body of a county shall cause a written individual notice of land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone.
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> "* * * * *
>
> "(9) For purposes of this section, property is rezoned when the governing body of the county:
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> "(a) Changes the base zoning classification of the property; or
>
> "(b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone."

classification of the property or (2) "[a]dopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone." Petitioner argues that Ordinance 1097 "limits or prohibits land uses previously allowed" in the Rural Residential (RR) zone where his property is located. According to petitioner, prior to adoption of Ordinance 1097, he believes that he could have achieved the desired lot line elimination and consolidation of his lots pursuant to a "property line adjustment," which is an allowed review use in the RR zone pursuant to Multnomah County Code (MCC) 33.3125(F), subject to the standards at MCC 33.3160(B).[11] Petitioner argues that Ordinance 1097 added to the list of allowed uses in the RR zone a new use category, the "Consolidation of Parcels and Lots pursuant to MCC 33.7794 and Replatting of Partition and Subdivision Plats pursuant to MCC 33.7797." Petitioner contends that, following adoption of Ordinance 1097, the lot line elimination and lot consolidation he desires can no longer be achieved via a simple "property

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[11] MCC 33.3160(B) provides:

> "Pursuant to the applicable provisions in MCC 33.7790, the approval authority may grant a property line adjustment between two contiguous Lots of Record upon finding that the approval criteria in (1) and (2) are met. The intent of the criteria is to ensure that the property line adjustment will not increase the potential number of lots or parcels in any subsequent land division proposal over that which could occur on the entirety of the combined lot areas before the adjustment.
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> "(1) The following dimensional and access requirements are met:
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> "(a) The relocated common property line is in compliance with all minimum yard and minimum front lot line length requirements;
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> "(b) If the properties abut a street, the required access requirements of MCC 33.3185 are met after the relocation of the common property line; and
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> "(2) At least one of the following situations occurs:
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> "(a) The lot or parcel proposed to be reduced in area is larger than 5 acres prior to the adjustment and remains 5 acres or larger in area after the adjustment, or
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> "(b) The lot or parcel proposed to be enlarged in area is less than 10 acres in area prior to the adjustment and remains less than 10 acres in area after the adjustment."

line adjustment," but instead must be achieved by means of a "replat" under Section 8 of Ordinance 1097, codified at MCC 33.7797. Further, petitioner argues that because his desired lot configuration will likely increase the number of "buildable lots," a replat under MCC 33.7797 must be reviewed as a "land division." MCC 33.7797(D)(2). Petitioner argues that satisfying the standards for a land division will require rigorous and expensive fully engineered road studies and sewer and water studies that make petitioner's proposed reconfiguration financially infeasible. Therefore, petitioner concludes, Ordinance 1097 "limits or prohibits land uses previously allowed in the affected zone" and is hence a "rezone" for purposes of Ballot Measure 56 notice requirements.

The county disputes, among other things, petitioner's premise that the desired reconfiguration of petitioner's subdivision lots could be accomplished by means of a simple "property line adjustment" under MCC 33.3160(B). According to the county, planning staff advised petitioner during pre-application conferences prior to adoption of Ordinance 1097 that the desired reconfiguration of petitioner's subdivision lots would require a replat under ORS chapter 92. We understand the county to argue that Ordinance 1097 did nothing to change that, and thus the ordinance did not "limit" any land use previously allowed in the RR zone, within the meaning of ORS 215.503(9)(b).

As far as we know, no court or review body has addressed the meaning of "rezone" under ORS 215.503(9)(b). Following passage of Ballot Measure 56, the Oregon Department of Justice prepared a letter of advice to DLCD dated November 30, 1999 that opined in relevant part that a local government "limits * * * land uses previously allowed in the affected zone" when it changes standards for uses presently allowed in the zone, and the change either physically restricts or constrains those uses, or narrows the circumstances under which the use may occur at all.[12] The letter of advice also opines that Measure 56

[12] We take official notice of the November 30, 1999 advice letter, which on page four concludes:

"applies only to governmental actions that *will,* necessarily (on the face of the ordinance), restrict the range or extent of permissible uses of property, relative to existing law." (Emphasis in original.) We agree with that letter of advice that whether an ordinance "rezones" property within the meaning of Ballot Measure 56 depends on whether the ordinance, on its face, restricts the range or extent of permissible uses of the property, compared to existing law.[13] Consequently, the first inquiry is what uses does the existing zoning ordinance allow. The second inquiry is whether the challenged ordinance restricts the range or extent of those existing, permissible uses.

Prior to adoption of Ordinance 1097, the RR zone permitted "property line adjustments" pursuant to MCC 33.3160(B). However, property line adjustments pursuant to that section are limited to "relocations" of common property boundaries between contiguous properties. Nothing cited to us in the RR zone or elsewhere in the county's pre-existing code permitted *elimination* of subdivision lots or consolidation of lots within a subdivision plat.

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> "Based on the preceding analysis, and particularly the plain meaning of the term 'limit' as it is used in Measure 56, a change in local government standards for uses that are presently allowed will be a 'rezoning' if the change physically restricts or constrains those uses, *or* narrows the circumstances under which the use may occur at all. Examples include ordinances that adopt new or amended land use regulations that make it more difficult to establish conditional uses, and ordinances that limit the extent of conditional uses or variances that are already allowed within particular zones. Similarly, new or amended base zone standards that reduce the extent to which uses are allowed outright are also 'rezonings' under Measure 56.
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> "Several additional points concerning which local ordinances are 'rezonings' for purposes of Measure 56 bear some discussion. First, subsections 1(5) and 3(5) indicate that Measure 56 applies only to governmental actions that *will,* necessarily (on the face of the ordinance), restrict the range or extent of permissible uses of property, relative to existing law. We believe that local ordinances that affect the use of property indirectly are not 'rezonings' for Measure 56 purposes. Thus, for example, ordinances that increase or impose a development fee generally will not be a 'rezoning,' as it will not be clear on the face of the ordinance that it *will* bind, restrain or confine the uses of property or otherwise prescribe limits on the use."

[13] It is arguable that property line adjustments, lot consolidations, replats and similar adjustments to property boundaries are not *uses* of land at all, and thus not "uses * * * allowed in the affected zone" for purposes of ORS 215.503(9)(b). However, at least in Multnomah County property line adjustments and—by virtue of Ordinance 1097, lot consolidations and replats as well—are listed as "review uses" allowed in the county's zoning districts. For purposes of this opinion, we assume that such property boundary manipulations constitute "uses * * * allowed in the affected zone" within the meaning of ORS 215.503(9)(b).

We therefore agree with the county that petitioner's starting premise—that prior to adoption of Ordinance 1097 the RR zone expressly permitted consolidation of subdivision lots as an allowed use—appears to be unfounded.

Rather than restricting uses allowed under the existing zoning code, Ordinance 1097 *adds* new listed "review uses" to the county's zoning districts that the code heretofore did not authorize at all: consolidation of subdivision lots and parcels and replatting of partition and subdivision plats. Ordinance 1097 also adds procedures and standards for such consolidations and replats, but such new procedures and standards apply only to those new "review uses," and do not apply to any other use listed in the existing ordinance. Accordingly, we agree with the county that petitioner has not established that Ordinance 1097 "limits or prohibits land uses previously allowed in the affected zone." ORS 215.503(9)(b). The county correctly found that "[n]o regulations are being proposed that further restrict the use of property and no mailed notice to individual property owners is required * * *." Record 81. Consequently, petitioner has not demonstrated that the county failed to provide a legally required individual written notice of the first hearing on Ordinance 1097, and thus there is no basis to conclude that the deadlines to appeal Ordinance 1097 were tolled under ORS 197.830(3).

Although the county does not discuss it, there is another, independent reason for concluding that *this* petitioner may not appeal Ordinance 1097 to LUBA under ORS 197.830(3), even if the ordinance did require Ballot Measure 56 notice. The first hearing on Ordinance 1097 was held on April 2, 2007. Petitioner states that he acquired his properties on May 31, 2007 and recorded the purchase on June 1, 2007. Thus, assuming Ordinance 1097 required Ballot Measure 56 notice, any notice would have been mailed to petitioner's predecessor in interest, as the owner of record, not to petitioner.[14] If there is any

[14] ORS 215.503(1) defines "owner" as "the owner of the title to real property or the contract purchaser of real property, of record as shown on the last available complete tax assessment roll."

remaining vitality to *Leonard*, under which a local government that conducts a hearing on a PAPA fails to "provid[e] a hearing" as to the petitioner because the local government failed to provide statutorily required individual written notice, we believe it must the *petitioner before LUBA* who is entitled to that notice, not some other person.

**C. Publication Notice**

ORS 215.223 provides, in relevant part:

> "(1) No zoning ordinance enacted by the county governing body may have legal effect unless prior to its enactment the governing body or the planning commission conducts one or more public hearings on the ordinance and unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation in the county or, in case the ordinance applies to only a part of the county, is so published in that part of the county.
>
> "(2) The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television."

*See also* ORS 215.060 (imposing similar notice requirements for actions concerning the comprehensive plan).

Petitioner does not dispute that the county published proper and timely notice of the July 12, 2007 public hearing before the BCC, in accordance with ORS 215.223. However, petitioner notes that ORS 215.223 requires that the county publish 10 days advance public notice of "each hearing." According to petitioner, the July 26, 2007 proceeding at which the BCC conducted the second reading of Ordinance 1097 and adopted the ordinance was a "public hearing on the ordinance," and therefore the county was required, but failed, to provide notice under ORS 215.223(1). Consequently, petitioner argues, Ordinance 1097 is without "legal effect" and must be remanded. *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002) (remanding comprehensive plan amendments under ORS 215.060 where the county failed to provide any publication notice of the public hearings held).

However, a passage in *Ramsey*, the case petitioner cites, indicates that petitioner's reliance on ORS 215.223 and 215.060 is flawed. In *Ramsey*, the county provided Ballot

Measure 56 notice of the first public hearing, but no publication notice for that first public hearing, or the subsequent hearings. We noted, in relevant part, that

> * * * the county's failure to repeat that [Ballot Measure 56] individual written notice before the October 4, 2001 and October 11, 2001 public hearings does not violate ORS 215.060 in the circumstances presented here. This is because the September 20, 2001 public hearing was properly continued to October 4, 2001, and the October 4, 2001 public hearing was properly continued to October 11, 2001. *Apalategui v. Washington County*, 80 Or App 508, 514, 723 P2d 1021 (1986) (ORS 215.060 is satisfied where "[t]he date of each hearing held without published notice was announced at a hearing held pursuant to a published notice or at a hearing which was itself announced at a hearing held pursuant to public notice"). 43 Or LUBA at 27-28.

The same reasoning seems applicable here under ORS 215.223. Petitioner does not assert that the July 12, 2007 hearing was not properly continued to July 26, 2007, that is, the date of the next hearing was not announced at the July 12, 2007 hearing. Absent some allegation to that effect, we have no basis to agree with petitioner that the county erred in failing to provide publication notice of the July 26, 2007 proceeding.

In any case, even if the county had failed to comply with ORS 215.223, we disagree with petitioner's premise that failure to provide *publication* notice is the kind of notice failure that can trigger the application of ORS 197.830(3), under the theory described in *Leonard*. As far as we are aware, every case applying *Leonard* has involved individual written notice required by state or local law. As we explained above, we believe the principle described in *Leonard* to be limited to circumstances where the petitioner before LUBA is entitled to individual written notice under state law. It would be a significant extension of *Leonard* to hold that a person who is not entitled to individual written notice may nonetheless file a belated appeal of a PAPA decision under ORS 197.830(3), based on the local government's failure to provide newspaper publication notice of the hearings. Given our uncertainty over the extent to which *Leonard* remains viable law, petitioner has not demonstrated that an extension of the holding in that case is appropriate.

**D. Conclusion**

For the foregoing reasons, petitioner has not established that ORS 197.830(3) establishes the applicable appeal deadlines with respect to Ordinance 1097. It follows that the deadline to appeal Ordinance 1097 is governed by the second sentence of ORS 197.830(9). There is no dispute that the appeal is untimely under that statute. For the same reason, ORS 197.830(3) does not apply to obviate the requirement in ORS 197.620(1) that petitioner establish standing to appeal Ordinance 1097, by participating in the proceedings before the county. Accordingly, this Board lacks jurisdiction over the appeal.

This appeal is dismissed.